







# BENTHAM'S THEORY OF LEGISLATION

BEING  
PRINCIPES DE LÉGISLATION  
AND  
TRAITÉS DE LÉGISLATION, CIVILE ET  
PÉNALE

TRANSLATED AND EDITED FROM THE FRENCH OF  
ÉTIENNE DUMONT

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VOL. II.  
PRINCIPLES OF THE PENAL CODE

HUMPHREY MILFORD  
OXFORD UNIVERSITY PRESS  
LONDON, EDINBURGH, GLASGOW  
NEW YORK, TORONTO, MELBOURNE, BOMBAY

1914





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# TREATISES ON LEGISLATION

## PRINCIPLES OF THE PENAL CODE.

### PART I.

#### OF OFFENCES.

THE object of this part of the Code is to describe and <sup>Introduc-</sup> classify offences, and to direct attention to the circum-<sup>tion.</sup> stances which serve to aggravate or extenuate them. It is the treatise on ailments, which naturally precedes the one on their remedies.

The nomenclature of offences, which is generally accepted, is not merely incomplete: it is absolutely misleading. Unless we begin by reforming this nomenclature, we shall be driven to leave the science in the state of obscurity in which we found it.

### CHAPTER I.

#### CLASSIFICATION OF OFFENCES.

WHAT is meant by an 'offence'? The meaning of the <sup>Meaning of</sup> word varies according to the subject under discussion. If <sup>offence.</sup> we are concerned with a system of laws already established, it is an offence to do any act which the legislature has prohibited, whether for a good reason or a bad one. If we are concerned with a theoretical inquiry to ascertain the best laws possible, we give the name 'offence' to any act which

ought, as we think, to be prohibited on account of some evil or mischief it produces or tends to produce. In this work the word is employed throughout in the latter sense only.

The most general classification of offences can be derived from that of the various persons who may be subject to their effects. We will therefore divide them into four main classes:

(i.) *Private Offences*.—Offences that are detrimental, in the first instance, to assignable<sup>1</sup> persons other than the offender himself.

(ii.) *Reflective or Self-Regarding Offences*.—Offences which, in the first instance, are detrimental to the offender himself and to no one else, unless it be by reason of their being detrimental to himself.

(iii.) *Semi-Public Offences*.—Offences which affect a portion of the community, a district, a particular corporation, a religious sect, a trading company, or, indeed, any association of individuals united by some common interest. The persons to whom such an offence may prove detrimental cannot be individually assigned; but the circle within which they are comprised is of less extent than that which embraces the whole community.

No present or past evil could constitute such an offence; for in that case the individuals who suffer or have suffered would be assignable, and the offence would be within

<sup>1</sup> 'Assignable'—i.e., either by name, or at least by description, in such manner as to be sufficiently distinguished from all others; for instance, by the circumstance of being the owner or occupier of such and such goods (*Principles of Morals and Legislation*, chap. xvi. [4], note). Cf. a note by Bentham on the Instructions of Catherine II. (Art. VI., §§ 35, 36): 'There can be but two cases, says the Empress of Russia, in which an act ought to be forbidden: where the tendency of it is pernicious to such or such individuals in particular, and where it is pernicious to the community in general. For the end, the only proper end and object of the law, is the greatest possible happiness of those who live under its protection. It cannot have another.'—Here, then, the supremacy of the Principle of Utility stands confessed: a fuller and more explicit recognition of it language cannot frame (MSS. University College, No. 32 [*Legislation VI.*, Code Civil]; cited by Halévy, i. 314). (C. M. A.)

Class i., a 'private' offence. In semi-public offences we are concerned with some mischief in the future, a *danger* threatening non-assignable individuals.

(iv.) *Public Offences*.—Offences which threaten common danger to all the members of the community or to an indefinite number of non-assignable individuals; although no particular individual should appear more likely than another to suffer from them.<sup>1</sup>

<sup>1</sup> The fewer persons there are in a district or corporation, the more probable it is that the parties injured will become assignable; so that it is sometimes difficult to decide whether a given offence is private or semi-public. The larger the district or corporation is, the nearer does an offence affecting it approach the class of public offences. The three classes are, therefore, liable to run into one another and be confounded; but this is inevitable in the case of all ideal divisions, such as we are constantly driven to frame for the sake of order and convenience of discourse (Dumont).

In the *Introduction to the Principles of Morals and Legislation* (chap. xvi. [10]) there is added a fifth class: 'multiform or heterogeneous' offences—i.e., offences by *falsehood*, and offences concerning *trust*; and see chap. xvi. (66). In a note to the second edition of the *Introduction* (chap. xvi. [10]) Bentham allows that 'maturer views have suggested the feasibility, and the means, of ridding the system of this anomalous excrescence.' (C. M. A.)

## CHAPTER II.

### SUBDIVISION OF OFFENCES.

**Private offences: subdivision.** SUBDIVISION OF PRIVATE OFFENCES.—Seeing that a man's well-being and happiness flow from four sources, the offences by which he may be assailed range themselves into four divisions: (α) Offences against the person; (β) offences against property; (γ) offences against reputation; and (δ) offences against condition—that is to say, offences that assail some domestic or civil relation, such as that of father and child, husband and wife, master and servant, citizen and magistrate, etc.<sup>1</sup>

Offences which are detrimental in more than one relation may be designated by compound terms—thus, offences against the person and property; offences against the person and reputation; and so on.

**Reflective or self-regarding offences: subdivision.** SUBDIVISION OF REFLECTIVE OR SELF-REGARDING OFFENCES.—Acts productive of mischief to oneself are, properly speaking, known as vice or imprudence. It is useful to classify them; not for the purpose of subjecting them to the severity of the legislator, but rather to remind him, by a single word, that such or such an action is beyond his sphere. In whatever points a man is vulnerable by the hand of another, in the same points may he be conceived to be vulnerable by his own: we can injure ourselves in person, property,\* reputation, or condition. Whatever

<sup>1</sup> 'An offence the tendency of which is to lessen the facility you might otherwise have of deriving happiness from the services of a person thus specially connected with you may be styled an offence against your condition in life, or simply against your condition' (*Introduction to Principles of Morals and Legislation*, chap. xvi. [11]). Cf. *anté*, vol. i., 263, note. (C. M. A.)

## Subdivision of Offences.

divisions will serve for private offences will therefore serve also for these.

**SUBDIVISION OF SEMI-PUBLIC OFFENCES.**—These offences consist, for the most part, in the breach of laws of which the object is to protect the inhabitants of a district from the various physical calamities to which they may, from time to time, be exposed. These laws include, for example, regulations to prevent the spread of infectious disease, to maintain dykes and embankments, to ward off the ravages of destructive animals, to guard against famine. Such acts as tend to bring about the calamity form the first species of semi-public offences. Semi-public offences: subdivision.

The second species comprises offences which may be committed without the complicity of nature; such as threats directed against a particular class of persons, false accusations or libels assailing the honour of a body corporate, insults offered to some religious object, stealing the property of a company, or destroying the adornments of a city.

The first sort are based on some *calamity*, the second on mere *malice*.

**SUBDIVISION OF PUBLIC OFFENCES.**—These offences range themselves under nine heads, thus:<sup>1</sup> Public offences, i.e., offences against the State: subdivision.

(a) *Offences against External Security.*—Those which tend to expose the country to the attacks of a foreign enemy; such as any act which provokes or encourages an invasion of the territory.

(β) and (γ) *Offences against Justice and the Police.*—It is difficult to draw a line separating these two branches of administration. Their functions are directed towards the same object—that of maintaining the peace as against internal adversaries. But Justice relates particularly to crimes already committed; her power is not displayed

<sup>1</sup> In the *Introduction to the Principles of Morals*, etc., there are eleven subdivisions, of which two are here suppressed by Dumont—i.e., (1) offences against the positive increase of the national felicity, and (2) offences against the national interest in general. (C. M. A.)

Subdivision  
of Public  
Offences—  
contd.

until *after* the discovery of some act or design that threatens the security of the citizens. The power of the Police is exerted rather in the prevention of crimes or physical calamities: its expedients are applied *beforehand* and take the form of precautions (not of punishments), anticipating probable evils and providing for probable wants. Offences against Justice and the Police are such as tend to thwart or misdirect the operations of either of these two powers.

(δ) *Offences against the Public Force.*—Those which tend to thwart or misdirect the operations of the military force, designed to protect the State against external foes, and against such internal adversaries as the Government cannot subdue without the employment of an armed force.

(ε) *Offences against the Public Wealth.*—Those which tend to diminish the revenue, by impeding or misdirecting the application of funds destined to the service of the State.

(ζ) *Offences against Population.*—Those which tend to diminish the aggregate number of the members of the community.

(η) *Offences against the National Wealth.*—Those which tend to diminish the quantity, or impair the value, of the things which compose the separate properties of the several members of the community.

(θ) *Offences against Sovereignty.*—It is the more difficult to convey a clear conception of these offences, inasmuch as there are many States where it would be wellnigh impossible to resolve the question of fact: Where does the Supreme Power reside?

The simplest explanation is as follows: To the whole assemblage of persons charged to control the various political operations, we usually assign the collective appellation of 'the Government.' There is commonly in a State some person or body of persons whose office it is to assign to and distribute among the members of the Government their several departments, their functions, and their prerogatives, while retaining a general authority over them

severally and collectively. The person or body of persons exercising this supreme power is termed 'the Sovereign.' Offences against Sovereignty are, then, such as impede or misdirect the operations of the Sovereign, and may (or perhaps must), therefore, impede or misdirect the different departments of government.

(c) *Offences against Religion*.—Governments cannot possess a complete and universal knowledge of what passes in secret; nor can they be assured of always reaching a guilty man, with the certainty that would leave him no loophole of escape. To supply these deficiencies of human power, it has been thought necessary to inculcate upon the minds of the people a belief in the existence of a supernatural power. I am here speaking of religious systems in general, and not of any particular creed. To this superior power is attributed a disposition to maintain and enforce the laws that regulate society, by punishing or rewarding, at some time or other, such actions as men have failed to punish or reward in this life. 'Religion' is represented as a sort of allegorical or fictitious personage, charged to conserve and strengthen in mankind a dread of this supreme judge. To diminish, then, or misapply the influence of religion is *pro tanto* to diminish or misapply the services which it renders to the State, whether they be directed to the repression of crime or to the encouragement of virtue. Anything which tends to impede or misdirect the operations of the Supreme Power is termed an offence against Religion.<sup>1</sup>

<sup>1</sup> We are here concerned with the utility of religion from the political point of view, without regard to its truth. I say *offence against Religion*, the fictitious entity: not *offence against God*, the real being. For how can a feeble mortal offend a being insusceptible of pain, or affect his happiness? In what category should we class the supposed crime? Should it be an offence against his person, his property, his reputation, or his condition? (Dumont). And see *Introduction to Principles of Morals and Legislation*, chap. xvi. (18), note. (C. M. A.)

## CHAPTER III.

### SOME OTHER DIVISIONS.

THE divisions of which we are about to speak may all be brought within the divisions of the fundamental classification; but they are employed at times for the sake of brevity, or to bring into notice some special circumstance in the nature of an offence.

#### Complex offences.

(a) *Complex Offences in Contradistinction to Simple Offences.*—An offence which at the same time assails the person and the reputation jointly, or the reputation and property jointly, is a complex offence. Moreover, a public offence may include a private offence. For example, an act of perjury which, while rescuing a criminal, brings punishment upon an innocent man, is at once a public and a private wrong. It thus becomes a complex offence.

#### Principal and accessory offences.

(β) *Principal and Accessory Offences.*—The principal offence is the very act from which the mischief in question takes its immediate rise;<sup>1</sup> accessory offences are such acts as have, in greater or less degree, prepared the way for the consummation of the principal offence. Thus, in the crime of coining, the true principal offence is the act of the man who utters the base money; for in that act the loss to the recipient takes its immediate rise. The mere counterfeiting of the coin is, from this point of view, the accessory offence.

#### Positive and negative offences.

(γ) *Positive and Negative Offences.* A positive offence is the consequence of an act committed to bring about the

<sup>1</sup> Cf. *Introduction to Principles of Morals and Legislation*, chap. xvi. (31), note. (C. M. A.)

particular end in fact attained. A negative offence is the consequence of an omission to act, an omission to do what it was one's duty to do. So far as defamation is concerned, Horace has finely distinguished the two classes of offence:<sup>1</sup>

'Absentem qui rodit amicum,  
Qui non defendit alio culpante, . . . hic niger est.'

Grave offences are generally of the positive kind. The gravest of the negative kind belong to the class of public offences—the mere slumbering of the shepherd may entail the destruction of his flock.

No doubt, in any really perfect system, there would be many cases in which a negative offence should be ranked, in point of enormity, with a positive one.<sup>2</sup> To persuade a man to enter, with a lighted candle in his hand, a room which one knew to be filled with loose gunpowder, and so to compass his death, would amount to a positive act of homicide; but if, on seeing him about to enter of his own accord, one were to allow him to do so without warning him of the danger, that would amount to a negative offence which should be ranged under the same head. We shall, however, have occasion to note elsewhere a circumstance which, speaking generally, places the negative offence below the corresponding positive offence in point of gravity.

(8) *Offences of which the Mischief is Imaginary.*—These are acts which, although they produce no real mischief, have, through prejudice, mistakes, or an application of the ascetic principle,<sup>3</sup> come to be regarded as offences. They vary with time and place: they arise and they disappear, having their origin in, and coming to an end with, the curious ideas which served as their foundation. We could trace the history of offences which have, in their day, engaged the most serious attention of the Legislature,

Offences of  
which the  
mischief is  
imaginary.

<sup>1</sup> Horace, *serm. i. (iv.)*, 81. (C. M. A.)

<sup>2</sup> *Cf. ante*, 'Principles of Legislation,' vol. i., chap. xii. (iii.), at p. 86. (C. M. A.)

<sup>3</sup> *Cf. ante*, 'Principles of Legislation,' at p. 6. (C. M. A.)

Imaginary  
offences—  
could.

and are now the subject of open ridicule. Such was the offence for which, at Rome, vestal virgins were buried alive.<sup>1</sup> Such are heresy and witchcraft<sup>2</sup>—imaginary crimes, for which thousands of innocent victims have perished in the flames.

To give a clear notion of this class of offence, there is no need to prepare an exhaustive catalogue; it will be enough to point out some of the principal groups. We take leave to say to the Legislator: 'Inasmuch as the mischief assignable to any such action is imaginary, it will be well not to prohibit it by law.' We do not, however, say to the Citizen: 'It will be well to commit the act in spite of public opinion and the law.'

Principal  
groups of  
such  
offences.

We may indicate the following groups: (i.) Offences against laws exacting professions of religious belief or the performance of religious practices. (ii.) Offences consisting in the making of innocent bargains which the laws have, on some false ground, prohibited; as, *e.g.*, usurious contracts.<sup>3</sup> (iii.) Offences consisting in emigration on the part of artisans or other citizens.<sup>4</sup> (iv.) Offences consisting in the breach of prohibitive regulations of which the effect is to place restraints on one class of citizens with the object of favouring another class. Take, for example, the law which forbids the exportation of wool from England:

<sup>1</sup> Cf. 'Domitian was not deterred by any sense of his own vices from the attempt to reform the morals of his countrymen. . . . The culprit (Cornelia) was condemned and duly entombed alive, with a crust and a flask of water, in a vault prepared for her. . . . The alleged partner of the crime, a Roman knight, was scourged to death, protesting his innocence also' (Merivale's *History of the Romans under the Empire*, vol. vii., p. 360). (C. M. A.)

<sup>2</sup> As to legislation on the subject of Witchcraft, see Bowring's edition of Bentham, vol. vii., p. 101, note. (C. M. A.)

<sup>3</sup> See Bentham's *Defence of Usury* (Bowring, vol. iii., pp. 1-29), and the note, *ante*, vol. i., p. 186. (C. M. A.)

<sup>4</sup> The mischief of the prohibition is sensible enough, and may become very grave. To forbid a man quitting his native land when he cannot earn his daily bread there may amount to a sentence of death. But where shall we find a human being on whom the mischief of the offence has fallen, in the shape of suffering? (Dumont). Cf., *e.g.*, 5 Geo. I., c. 27, and 23 Geo. II., c. 13; see, too, Blackstone's *Commentaries*, book iv., c. 12 (11). (C. M. A.)

a prohibition which secures benefits to the manufacturer at the expense of the farmer.<sup>1</sup> When dealing hereafter with offences against oneself and with crimes of lewdness, unaccompanied by any act of public indecency, where neither violence nor fraud is employed, we shall see that, considered from the public point of view, they will range themselves under the same head.

<sup>1</sup> An old statute of 27 Edw. III. declared it felony to transport wool, and there were many subsequent statutes dealing with the subject. The statute 8 Eliz., c. 3, prohibited the transportation of live sheep, under severe penalties. By 28 Geo. III., c. 38, all the Acts were repealed and consolidated; and under that statute owners of sheep, shorn within five miles of the sea (ten miles in Kent and Sussex), were required to give notice to officials of the nearest port before removing any wool. This Act was repealed by the Statute Law Revision Act, 1861. (C. M. A.)

## CHAPTER IV.

### EVIL OR MISCHIEF OF THE SECOND ORDER.

Evil of the  
second  
order:  
'Alarm.'

THE 'alarm' inspired by various offences is susceptible of many gradations, from mere disquiet to positive terror. But does not the degree of alarm depend on the imagination, the temperament, age, sex, position, experience? When the causes of variation are so numerous and complex, can we possibly calculate the effect beforehand? In a word, is the rate of increase so orderly and well defined that we can mark and measure the gradations of alarm?<sup>1</sup>

Though we cannot, with rigorous precision, reduce to scale that which is subject to so mobile and whimsical a faculty as the imagination, yet the general alarm produced by various offences assumes shapes sufficiently regular and definite to enable us, within certain limits, to graduate the scale. The degree of 'Alarm' is greater or less according to the following circumstances:

(a) The extent of the evil of the first order (see *post*, Chapter V.).

(β) The good or bad faith of the offender in relation to the act in question (see *post*, Chapter VI.).

(γ) The position which has afforded him an opportunity of committing the offence (see *post*, Chapter VII.).

(δ) The motive which induced the act (see *post*, Chapter VIII.).

(e) The greater or less ease with which like offences may be prevented (see *post*, Chapter IX.).

<sup>1</sup> Cf. *ante*, 'Principles of Legislation,' chap. x., vol. i., at p. 66. (C. M. A.)

(ζ) The greater or less ease with which such an offence can be concealed and the offender shielded from punishment (see *post*, Chapter X.).

(η) The character of the delinquent as displayed by the nature and circumstances of the offence (see *post*, Chapter XI.).

(θ) The condition of the individual injured. This is a material consideration, and it will depend on the particular circumstances whether those in a like condition will or will not be led to feel a sensation of fear.<sup>1</sup>

A solution of some of the most interesting problems of penal jurisprudence will be reached by a careful examination of the foregoing circumstances.

<sup>1</sup> Circumstances β to η inclusive affect the probability of a repetition of the offence (Dumont).

## CHAPTER V.

### OF EVIL OR MISCHIEF OF THE FIRST ORDER.

Extent of  
evil of the  
first Order.

WE may estimate the extent of the evil of the first order resulting from an offence by employing the following rules:

(*a*) The evil of a complex offence will be *greater* than that of either of the simple offences into which it can be resolved.

An act of perjury, which results in the infliction of punishment on an innocent man, will cause more mischief than an act of forswearing, which merely procures the discharge of a guilty one. In the first case there is a private offence conjoined with the public offence; while in the other case there is nothing but the public offence.

(*β*) When the evil is of a sort that propagates itself, the evil of a public or semi-public offence will be *greater* than that of a private one in the same category. It is more hurtful to carry pestilence to some great continent than to a small island sparsely inhabited and rarely visited.\* In this tendency to spread there lies the peculiar gravity of the crime of arson and of flooding lands.<sup>1</sup>

(*γ*) When the evil is of a sort that, instead of multiplying, is simply distributed, the evil of a public or semi-public offence will be *less* than that of a private one in the same category. Thus, if the exchequer of a State were pillaged, the evil of the first order would be less than in the case of a theft of like extent from a private individual. For,

<sup>1</sup> In his original MSS. Bentham describes 'l'inondation' as 'un crime heureusement assez rare mais capable dans certaines positions d'entraîner des suites encore plus funestes'—i.e., than the crime of arson (cf. Halévy, i. 380). Until 1824 it was a capital offence to destroy banks, &c., in the Bedford Level (see 27 Geo. II., c. 19, s. 49; and 4 Geo. IV., c. 46; and cf. *post*, p. 186, note). (C. M. A.)

suppose we wished to repair the wrong inflicted on such an individual, we should have to award him, at the public expense, compensation to the amount of his loss. Then, even after the sum representing his damage has been paid over to him, matters would be in just the same position as if the theft, instead of being from Peter or Paul, had been from the treasury in the first instance.<sup>1</sup>

It is only offences against property that are susceptible of this distribution; and the mischief of such offences is diminished in proportion as it is distributed among a greater number and among individuals of greater wealth.<sup>2</sup>

(δ) The aggregate evil of an offence is *greater* if the person injured thereby suffers some consequential mischief. If, by reason of an imprisonment or a wound, you have lost some office that you sought, a marriage that you desired, or a profitable piece of business, it is manifest that such loss forms an addition to the sum of original mischief.

(ε) The aggregate evil of an offence is *greater* if a third person thereby suffers some derivative mischief. If, by reason of a wrongful act committed by you, your wife or children are reduced to penury, there is a clear addition to the sum of original mischief. •

Besides these rules, which must always be observed in assessing evil of the first order, we should also take into account its aggravations; that is, any special circumstances which tend to increase the mischief wrought by the offence. We will afterwards present a complete synopsis, but the principal forms of aggravation are—

Aggravations of Evil of the first Order.

(i.) *Increase of Physical Pain.*—That is, additional mischief resulting from an extraordinary access of physical pain, not of the essence of the offence. • •

(ii.) *Increase of Terror.*—That is, additional mischief

<sup>1</sup> Although the evil of the first order is less, such is not the case with the evil of the second order—i.e., the 'alarm.' (Dumont.)

<sup>2</sup> I.e., in proportion to the number and wealth of the contributors. (C. M. A.)

caused by a circumstance which augments the essential evil of the offence by inducing a feeling of terror.

(iii.) *Aggravation of Disgrace*.—That is, additional mischief arising from some extraordinary circumstance of ignominy.

(iv.) *Injury Irreparable*.—Additional mischief arising from the irreparable nature of the damage.

(v.) *Aggravation of Suffering*.—Additional mischief resulting from some circumstance which points to an extraordinary degree of sensibility on the part of the person injured.

These rules are essential. We must know how to assess evil of the first order, because the 'alarm' will be more or less great in proportion to its real or apparent value: evil of the second order is but a reflection of evil of the first order as it is represented in our imagination. But there are other circumstances which modify the 'alarm' (*cf. post*, pp. 17-37).

Extes  
evil of  
first

## CHAPTER VI.

### OF INTENTION AND BAD FAITH.

WHETHER a man commits an offence knowingly and wilfully, or whether he commits it unintentionally or even unwittingly, the immediate mischief is precisely the same. But the 'alarm' which results is very different. A man who does an injury, knowing that he is doing wrong and intending to do it, presents himself to one's mind as a wicked and dangerous fellow; while he who commits the mischievous act without such knowledge or without such intention seems as one to be feared by reason only of his ignorance or carelessness.

Where there is absence of ill-intent, there is but little 'alarm' created.

The security felt by the public when the commission of an offence is unaccompanied by any intention to do wrong is in no wise matter for surprise. Look at the circumstances of the act. The delinquent had no design to put himself in conflict with the laws: if he has committed an offence, it is because there was no motive impelling him to abstain from it.<sup>1</sup> Suppose it has resulted from an unfortunate

<sup>1</sup> Cf. as to 'Motives,' chap. viii., *post*, p. 22. For the purposes of his subject, Bentham understood by *motive* 'anything whatsoever which, by influencing the *will* of a sensitive being, is supposed to serve as a means of determining him to act, or voluntarily to forbear to act, upon any occasion.' 'The only way in which a *motive* can with safety and propriety be styled *good* or *bad* is,' in Bentham's view, '*with reference to its effects in each individual instance*, and principally from the *intention* it gives birth to: from which arise the most material part of its effects. A motive is good when the intention it gives birth to is a good one; bad, when the intention is a bad one; and an intention is good or bad according to the material consequences that are the objects of it. So far is it from the goodness of the intention's being to be known only from the species of the motive. But from one and the same motive may result intentions of every sort of complexion whatsoever' (*Introduction to Principles of Morals and Legislation*, chap. x. [3, 33]). (C. M. A.)

concourse of circumstances: in that case it is an isolated and fortuitous occurrence which has no tendency to lead to any like occurrence in the future. But a crime committed by a delinquent who intends to do wrong is an enduring source of mischief: we seem to see in what he has done what he can and will do again. His past conduct is a presage of his future behaviour. Moreover, the mere idea of a rascal is apt to sadden and frighten us: it brings to our minds the baneful and dangerous type of men who surround us with snares, and weave their plots in silence and secrecy.

The general public, guided by a sound instinct, almost always say of an offender, who acted in good faith, that he is more to be pitied than blamed. And, in truth, a man of quite ordinary sensibility can hardly fail to experience the most lively regret for mischief of which he has been the innocent cause: he needs consolation rather than punishment. He is even less to be feared than other men; since his regrets for the past will supply a most effective guarantee for his conduct in the future.

Moreover, when the commission of an offence is unaccompanied by an intention to do wrong, there is always a reasonable expectation of indemnity. If the man had acted deliberately, knowing all the time that he would incur a penalty, he would have taken precautions to avoid legal consequences; but, in his innocence, he remains exposed to every form of claim and process, and will not dream of resisting a demand for adequate amends.

Indications  
of bad  
faith and  
intentional  
wrong-  
doing.

Such is the general principle: its application is a matter of considerable difficulty. In order that we may fully recognize the various indications of bad faith and sinister design, we must needs consider carefully all the different conditions of mind conceivably possible at the moment when the act was committed, whether in relation to knowledge or intention. And how manifold are the changes and modifications of the human will and understanding!

An archer shoots an arrow on which he had written:

'For Philip's left eye.' The arrow strikes Philip's left eye. Here is indication of an intention corresponding precisely with the event.

A jealous husband surprises his rival, and, to wreak a lasting vengeance on him, performs an act of mutilation. The operation proves fatal. In this case, so far as any charge of murder goes, there is no full or complete intention to kill.

A hunter sees a stag and a man standing quite close to each other. He knows well enough that he cannot fire at the stag without placing the man in peril. Nevertheless he shoots, and it is the man who is slain. In such a case the slaughter is voluntary, but the intention to kill was indirect only.

So far as concerns the understanding, it may, in relation to the various circumstances of a deed, be in any one of three states: A State of Knowledge; a State of Ignorance; a State of Mistaken Belief. You may know that a certain beverage is a poison; you may know nothing whatever of its qualities; or you may believe that it would do very trifling injury, and perhaps, in certain cases, act as a remedy.

Such are the preliminary observations to be made as to the indications of bad faith and intentional wrong-doing. We shall not at this point pretend to pursue the many intricacies of the subject.\*

## CHAPTER VII.

### POSITION OF THE OFFENDER: ITS EFFECT UPON ALARM.

THERE are some offences that anyone may commit; there are others which depend on a particular situation or position, in that it supplies to the delinquent opportunity or occasion for the offence.

Such a circumstance ordinarily tends to diminish 'alarm' by contracting its sphere.

The commission of theft produces general alarm; but the malversation by a guardian of property belonging to his ward produces hardly any.

Whatever alarm might be occasioned by extortion on the part of an officer of police, it is certain that levies raised by brigands on the King's highway would excite fear to an infinitely greater extent. And why? Because we know well enough that even the most resolute peculator, holding a public office, is still subject to certain checks and certain restraints. To abuse his power and position he must find a special opportunity and plausible pretexts; while gentlemen of the road are, at all times, a menace to everybody, and care not a jot for public opinion.

This circumstance exerts the same sort of influence on other kinds of offences, such as seduction and adultery. You may rob the first woman you chance to meet; but you could not with equal readiness manage to seduce her. Such an enterprise usually requires for success a lengthy acquaintance, coupled with some degree of correspondence in rank and fortune—in a word, the advantage of a particular position.

Of two murders, the one committed to secure an inheritance, the other as an incident in a highway robbery, the first displays the more cruel disposition, but the latter arouses the greater amount of alarm. The man who rests assured of the humanity of his heirs will feel no appreciable alarm on hearing of the first event; but what security can he find against freebooters? We may add that the wretch who slays to secure a valuable heritage will not turn into an assassin of the highway: for a goodly estate he will run a risk that he would never dream of incurring for the sake of a few crowns.

Indeed, an observation may be made that will apply to all offences involving breach of trust, or any abuse of confidence or power, whether public or private. They cause less alarm in proportion as the situation of the delinquent is more special and uncommon—the persons in a like position fewer in number, and the sphere of the offence therefore more restricted.

There is, however, one *important exception*. If the offender is clothed with vast powers, and can embrace within his sphere of action a great number of persons, his position, although of a special character, widens the precincts of alarm instead of contracting them. Suppose a judge were resolved to pillage, kill, and play the tyrant—a military officer were to set about stealing, harassing, and shedding blood—the ‘alarm’ they would excite, being proportional to the extent of their powers, might surpass that excited by the most atrocious acts of brigandage.

Alarm increased when Offender acts in abuse of high office.

In such exalted situations it does not even need crime to create a lively sense of alarm; a mere mistake, without any evil intent, will suffice. Suppose an innocent man condemned to death by an honest but stupid judge: the moment the mistake is known public confidence is shaken, the shock is severely felt, and vast inquietude may result.

Happily, this species of alarm may be arrested at once by displacing the man who has shown himself unfit to hold office.

## CHAPTER VIII.

### THE INFLUENCE OF MOTIVES IN THE CREATION OF ALARM.

Alarm less  
when mo-  
tive is rare.

IF the offence in question proceeds from a special and rare motive, comprised in a class of motives few in number, the 'alarm' assumes comparatively small proportions. If it proceeds from a motive common to all men, which is frequently experienced and powerful in its effects, the 'alarm' will be of greater extent, because a larger number of persons will be apprehensive of danger.

Contrast the results of a murder committed for the sake of robbery with those of a murder committed from private revenge. In the first case the danger seems to menace the whole world; while in the second we are concerned with a crime which no one need dread, unless, indeed, he chance to have an enemy whose hatred has assumed an aspect of absolute ferocity.<sup>a</sup> So, too, an offence which springs from some quarrel between rival parties will occasion more alarm than a similar offence committed from private enmity.

Towards the middle of the eighteenth century there existed in Denmark and in some parts of Germany a certain religious sect whose principles were more calculated than the most foul and fierce passions to beget terror. According to these fanatics. It was not good works, but repentance, that pointed the surest road to heaven; and repentance was, in this regard, the more effective the more completely all the faculties were obsessed by it. Now, it is plain that the more atrocious the crime committed, the greater will be the remorse, and the greater, therefore, the

certainly of its bringing into play these forces of atonement. Accordingly, on the strength of this logic, a crazy fellow set out one day to secure salvation and the scaffold by slaughtering a blameless child of tender years. If this sect had managed to survive, there would soon have been an end of the human race.<sup>1</sup>

Motives are commonly spoken of as *good* or *bad*; but that is a mistake. In the final analysis, every motive is a picture in perspective of some pleasure to be procured or of some pain to be avoided. The very same motive, which leads in certain cases to the performance of an act accounted as good or indifferent, may in other cases lead to some act accounted as bad. A poor creature steals a loaf of bread; another buys one; while a third sets to work to earn the price of one. The motive which prompts the act of each of the three is precisely the same—namely, the physical want known as hunger. Again, suppose some pious man founds a hospital for the poor; another sets out on a pilgrimage to Mecca; while a third assassinates some prince whom he regards as a heretic: their motive may be in all respects the same—a desire to win the goodwill of the Deity, according to the varying notions they have formed of the divine power. Or suppose that a geometer leads the frugal life of a hermit and devotes himself to profound study; a man of the world ruins himself and a host of creditors by reckless ostentation; a prince engages in a war of conquest, and sacrifices to his project the lives of thousands of men; when the people are reduced to the point of submission, some brave warrior is raised up to inspire them with courage, and triumphs over the usurper. All these men may be animated by precisely the same motive—namely, the love of reputation.

Motives  
should not  
be classed  
as 'good',  
and 'bad.'

<sup>1</sup> I have read, somewhere or other, that on the first appearance of this craze in Prussia the great Frederic ordered the assassin to be shut up in a madhouse. He thought that the death penalty would be rather a reward than a punishment. This was quite enough to put a stop to such criminal operations (Dumont).

In this way we might inquire into all kinds of motives, and we should find that any one of them may actuate alike deeds that are truly laudable and deeds that are highly criminal. A motive, then, ought not to be regarded as constantly good or constantly bad.

Motives  
classed as  
'social,'  
'semi-  
social,' 'dis-  
social,' and  
'personal.'

However, in considering the whole catalogue of motives—that is to say, the whole catalogue of pleasures and pains—we may classify them according to their apparent tendency to unite, or disunite, the interests of a particular person and the interests of his fellows. On this plan they may be distinguished into four classes: The *purely social* motive, goodwill; *semi-social* motives, the love of reputation, the desire of amity, religion; *dissocial* motives, antipathy and all its offshoots; *personal* or *self-regarding* motives, sensual desire, pecuniary interest, love of power, self-preservation.<sup>1</sup>

Personal motives are pre-eminently useful: it is their action alone that can never be suspended, for Nature has entrusted to them the preservation of the species. They are the great wheels of the social machine; but their motion must be regulated, checked, and kept in the right groove, by motives comprised in the first two classes.

We must not forget that even the dissocial motives, necessary as they are, in some measure, for the protection of the community, may, and often do, give birth to useful actions—indeed, to actions essential to the existence of a civilised society; for example, the charging and prosecution of malefactors.

Motives  
classed as  
'tutelary  
and 'se-  
ducing.'

We might make another classification of motives by considering them in relation to their ordinary tendency—that is to say, by considering whether they are commonly productive of good or of bad effects. The social and semi-

<sup>1</sup> 'As including the fear of the pains of the senses, the love of ease, and the love of life' (*Introduction to Principles of Morals and Legislation*, chap. x. [34]). (C. M. A.)

social motives might be termed *tutelary*<sup>1</sup> motives; the dissocial and personal, *seducing*<sup>2</sup> motives. This classification must not be taken in a strict and rigorous sense, but it is certainly not lacking in justice and accuracy; for whenever motives acting in opposite directions come into collision, the social and semi-social motives will generally be found operating in accord with utility, while the dissocial and personal motives tend to conflict with it.

Without diving further into questions of motive, let us confine ourselves to such considerations as are of direct interest to the legislator. To judge of an action we must look first at its effects, quite apart from anything else. These effects being clearly ascertained, we may in some cases also trace the motive and note its influence on the extent of the 'alarm,' but without paying any regard to the quality, good or bad, that its vulgar name would seem to attach to it.<sup>3</sup> A motive, however much approved, cannot transform a pernicious action into one that is useful or indifferent; nor can a motive, however reprobated, turn a useful deed into a mischievous one. All that motive can do is to enhance or diminish, in greater or less degree, the moral quality of an action. A good action prompted by a *tutelary* motive becomes better; a bad action prompted

We must not be misled by vulgar names attached to particular motives.

<sup>1</sup> Or 'preservatory' (*Introduction to Principles of Morals and Legislation*, chap. xi. [29]). (C. M. A.)

<sup>2</sup> Or 'corrupting' (*ibid.*). (C. M. A.)

<sup>3</sup> What I mean by the 'vulgar names' of motives are such names as carry with them, or impute, an idea of approbation or reprobation. A neutral name is one which describes the motive without any association of praise or blame—for example, pecuniary interest, love of power, desire of amity and favour whether with God or man, curiosity, love of reputation, resentment for an injury, self-preservation. But these same motives bear vulgar names, such as avarice, cupidity, ambition, vanity, vengeance, animosity, cowardice, etc. When a motive is branded with a name of reprobation, it would appear contradictory to aver that good can result from it; while if it bears a name that marks approval, it seems equally contradictory to suppose that mischief can arise from it. Almost all disputes on morals turn on this point: they are brought to an end at once if we give neutral names to motives. We can then proceed to examine their effects without being harassed by contact with vulgar notions (Dumont).

by a *seducing* motive becomes worse. Let us apply this theory to practice. A motive comprised in the group of seducing motives will not of itself make the act criminal; but it may well operate as a source of *aggravation*. A motive comprised in the group of tutelary motives will not justify or clear of guilt; but it may well serve to reduce the necessity of punishment, or, in other words, it may operate as a ground of *extenuation*.

Difficulty  
of analyzing one's  
own motives

We are constrained to confine our consideration of motives to the case of those which are manifest and, so to speak, palpable. It would often prove extremely difficult to grip the true or dominant motive when the action is such that it might equally well be assigned to any one of several motives, or is such that it might have been prompted by the conjoint operation of a number of motives. Where the real interpretation is so uncertain, we should mistrust the malevolence of the human heart, and the general disposition there is to display acuteness of mind at the expense of charity. We deceive even ourselves when, in all honesty, we search to discover the motives that prompt our actions. In relation to their own motives, mankind may be likened to beings who remain blind by choice, and are ever ready to fly into a passion with the oculist who is anxious to remove the cataract of prejudice and ignorance.

## CHAPTER IX.

### THE EASE OR DIFFICULTY OF PREVENTING OFFENCES—A FURTHER CIRCUMSTANCE WHICH INFLUENCES ALARM.

THE mind is led at once to contrast the means of attack with the means of defence; and, according as a crime seems to us more or less easy of commission, our disquiet is more or less pronounced. It is on this ground, amongst others, that the mischief of an act of robbery is placed so much higher than the mischief of theft or misappropriation. Force can accomplish many things which would be beyond the reach of fraud or artifice.

Again, robbery accompanied by the breaking of a dwelling-house excites more alarm than robbery on the highway; an offence committed after nightfall is more disquieting than one committed in the broad light of day; robbery conjoined with arson is more terrifying than robbery limited to the employment of ordinary methods. On the other hand, the greater the apparent ease of repelling an attempt at crime, the less disquieting does it seem to us. Indeed, where an offence cannot be committed at all without the privy and consent of the person against whom it was directed, the 'alarm' can hardly be very great. These observations may be readily applied to cases of fraudulent misappropriation, seduction, duelling; and to offences against oneself, notably suicide.

The rigour of the laws against theft by a member of one's own household doubtless had its origin in the difficulty of guarding against this class of offence.<sup>1</sup> But the aggrava-

'Alarm' influenced by difficulty of prevention

Larceny in a dwelling-house.

<sup>1</sup> Larceny from the dwelling-house, to the value of £5, is at the present day a more serious offence than simple larceny; but it was not

Larceny in  
a dwelling-  
house—  
contd.

tion resulting from this circumstance is more than counter-  
vailed by a circumstance which tends to diminish the  
'alarm'—namely, the special nature of the situation which  
affords opportunity for such a theft. The domestic thief,  
when once discovered, ceases to be dangerous. In order  
that he may rob me, he requires, in a sense, my consent;  
for I must introduce him into my house and give him my  
confidence. Seeing that I can so readily secure myself  
against attack, any alarm that may be inspired in me will  
surely be very trifling in degree.<sup>1</sup>

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distinguished from simple larceny at common law, except where it was  
accompanied by a breaking during the night. Nevertheless, at the time  
when Dumont wrote, by various statutes, the benefit of clergy had in  
almost every instance been taken away from larcenies committed in  
shops and dwelling-houses (*cf. post*, p. 158, note). (C. M. A.)

<sup>1</sup> The principal reason against severity of punishment in this case  
is that it renders masters disinclined to prosecute the offence, and thereby  
favours impunity (Dumont). [*Not in edition of 1802.*]

## CHAPTER X.

### THE GREATER OR LESS EASE WITH WHICH THE OFFENDER CAN REMAIN CONCEALED—ANOTHER CIRCUMSTANCE WHICH INFLUENCES ALARM.

THE 'alarm' is greater when, from the nature or circumstances of the crime, it becomes more difficult to unravel it or to detect its author. If the culprit remain unknown, his success affords encouragement to himself and to others; and when offences go unpunished, there is but little chance of checking the commission of like offences, while the injured party loses all hope of indemnity.

'Alarm' influenced by difficulty of detection.

There are certain crimes which admit of precautions peculiarly conducive to concealment, such as wearing a disguise, the choice of night as the time for action, the sending of anonymous letters of a threatening character or for purposes of extortion.

There are also certain distinct offences which are resorted to in order to increase the difficulty of discovering some other offence. Thus, a witness may be imprisoned, kidnapped, or even slain, to relieve an offender from the risk of damaging testimony.

In cases where, from the very nature of the crime, the culprit is necessarily known, the 'alarm' is considerably diminished. Thus, an open act of personal violence, referable to some momentary access of anger aroused by the presence of an enemy, will inspire less alarm than a theft committed clandestinely, although the evil of the first order may be greater.

## CHAPTER XI.

### EFFECT OF THE CHARACTER OF THE OFFENDER UPON ALARM.

WE may often guess the character of an offender from the nature of his offence; and, in particular, from the extent of evil of the first order, which is, of course, the most conspicuous part of the resulting mischief. We may also form some estimate of his character by considering the circumstances of the offence and scrutinizing his conduct during its commission.

The character or disposition of a man will appear more or less dangerous according as the tutelary motives appear to have a less or a greater sway over him, when compared with the seducing motives.

There are two grounds on which character should exert an influence on the choice and extent of punishment: first, because it increases or diminishes the 'alarm,' and, secondly, because it supplies an index of the offender's sensibility. When a man is of weak character, but really at heart a good fellow, there is no need to employ such strong measures of repression as in the case of a truculent knave.

Let us, at the outset, examine the circumstances that afford grounds for *aggravation of punishment*; in other words, what are the indications of a dangerous character?

(a) The first indication of a dangerous character is *oppression of the weak*. Our natural feeling of pity ought to be more strongly aroused when the injured party was not in a condition to protect himself.\* The laws of honour, coming to the support of this instinct of pity, make it an

imperious duty to be tender with the weak and to spare the man who has no power to resist.

(β) The second indication of a dangerous character is *aggravation of distress*. If mere weakness ought to awaken compassion, how much more should the sight of a suffering fellow-creature ! A bare refusal to succour a human being in distress is enough to raise a presumption by no means favourable to character. But with what stigma shall we brand the character of a man who seizes the hour of calamity to add further weight of woe to a soul in affliction, to embitter disgrace by some fresh affront, to strip poverty of its last rags ?

(γ) The third indication of a dangerous character is *disrespect towards superiors*. It is an all-important feature in the polity of morals that those who have enjoyed, in special measure, the opportunity of cultivating habits of reflection, those who may fairly be assumed to possess more wisdom and experience than their fellows, should secure the respect and regard of men who have not had the good fortune to acquire, to the same extent, a habit of reflection and the benefits of a liberal education. It will usually be found that this sort of superiority obtains in old men over young persons in the same position of life, in certain professions devoted to public instruction, and in the more distinguished ranks of citizens as compared with classes lower in the social scale. Among the great mass of the people, there have been formed sentiments of deference and respect based on such distinctions ; and in these sentiments, which prove most valuable for the ready repression of the seducing passions, we find one of the surest foundations of morals and of law.

(δ) The fourth indication of a dangerous character is *gratuitous cruelty*. It is plain that the sentiments of honour and goodwill can have operated with but little force, where the motives which led to the commission of an offence were in themselves slight and trivial. If we are to regard

Indications  
of a  
dangerous  
character—  
considered.

as dangerous a man who violates the laws of humanity under the impulse of an imperious craving for revenge, what shall we think of him who indulges in cruel deeds out of mere curiosity, or in imitation of others, or simply as an amusement ?

(e) The fifth indication of a dangerous character is *pre-meditation*. Time is peculiarly favourable to the development of the tutelary motives. As though overborne by the blasts of a storm, sentiments of virtue may yield for a moment to the onslaughts of passion; but if the heart be not corrupt, reflection readily restores their pristine vigour, and enables them to triumph. Where a considerable space of time has elapsed between the conception of a crime and its execution, that alone is damning evidence of ripe and resolute depravity.

(f) The sixth indication of a dangerous character is *concerted action*. The fact that there were a number of accomplices is an additional mark of iniquity. The circumstance of conspiracy presupposes deliberation, a plan long conceived and carefully thought out; while a combination of several persons to wrong a single innocent man evinces alike cruelty and cowardice.

Additional  
grounds of  
aggrava-  
tion: 'false-  
hood' and  
'breach of  
trust.'

To these grounds of aggravation, or indications of a dangerous character, we may add two others less easy to classify—namely, *falsehood* and *breach of trust*.

*Falsehood* stamps the character with a deep and degrading stain, which even the most brilliant qualities cannot efface. In this regard public opinion is sound. Truth is a primary need of mankind; it is an essential element of our existence—necessary to us as the light of the sun. At every moment of our lives we are forced to rest our judgments and to shape our conduct on facts, of which only a very small number can possibly be verified by our own personal observation. We are therefore quite unable to escape the necessity of trusting, and acting upon, the reports of other persons. What happens if these reports are

tainted with falsehood ? Why, our judgments are wrong, our actions faulty, and our hopes disappointed. We live in a state of disquiet and distrust, and know not where to turn for an assurance of safety. In a word, falsehood embraces the essence of every evil ; for, in the end, it would bring in its train the breaking up of human society.

So great is the importance of truth that the slightest infraction of its laws, even in trifling matters, is ever attended by some degree of danger. The smallest deviation from it is, in effect, a blow to the respect we owe to it ; for the first fault paves the way for a second, and we soon grow accustomed to the hateful notion of a lie. If, in matters which are in themselves of no consequence, the mischief of falsehood is so great, what must be its gravity on more important occasions, when lying serves as the instrument of crime ?

Falsehood is a circumstance which is sometimes of the very essence of an offence, while at other times it is a mere accessory. It is necessarily involved in the commission of perjury and in the various devices for obtaining property by fraud and false pretences. In other offences it is casual and collateral. It is, therefore, in relation only to such other offences that it can be said to furnish a separate and independent ground of aggravation.

*Breach of trust* has reference to some particular and responsible position ; to some power entrusted to the delinquent—a power coupled with a corresponding duty, which he has not scrupled to violate. Sometimes it may be regarded as the principal offence, at other times as an accessory offence. There is no need to enter upon details at this stage of our inquiry.

Let us make a general observation, bearing upon these various sources of aggravation. Although they all supply indications unfavourable to the character of the offender, it by no means follows that we should, proportionably, increase his punishment. We need only introduce some

modification, having a certain analogy with this accessory of the offence and sufficient to arouse in the public mind a wholesome antipathy to the particular aggravating circumstance. But this will become more clear when we treat of the divers modes of rendering punishments characteristic.<sup>1</sup>

Grounds of  
Extenuation.

Let us now proceed to consider the *extenuations*, drawn from the same source, and tending, in greater or less degree, to diminish the necessity for punishment. I apply this term to such circumstances as are calculated to lessen the extent of the alarm, inasmuch as they furnish indications favourable to the character of the offender. They may be reduced to nine: (α) Absence of evil intention; (β) Self-preservation; (γ) Previous provocation; (δ) Preservation of a beloved relative or friend; (ε) Excess of the violence justified in self-defence; (ζ) Yielding to menaces; (η) Yielding to authority; (θ) Drunkenness; (ι) Infancy.

Putting aside the last two, it is a factor common to all these circumstances that the offence had not its original source in the will of the offender; the primary cause being the act of some other person, the will of some other person, or physical accident. But for such primary cause, the offender would have had no thought of wrong-doing, and he would live, after the offence, as innocently as he had done before. Even though no punishment at all were inflicted, his conduct in the future would be as good as if he had never committed the offence.

Each of these circumstances demands a detailed examination; but I will here content myself with the remark that

<sup>1</sup> This title suggests a question of interest alike to the moralist and to the legislator. Suppose that a man indulges in an action, which, although condemned by local public opinion, conforms in all respects with the true principles of Utility; ought we, from this circumstance, to deduce an indication unfavourable to his character? I answer that a virtuous man, while submitting in general to the tribunal of public opinion, may reserve the right of private judgment in particular cases, where public opinion seems to demand of him a painful sacrifice which can prove of no real use to anybody else: as when a monk secretly violates some absurd and painful conventual observance (Dumont).

the judge must be allowed great latitude in estimating the validity and extent of these various grounds of extenuation.

Suppose, for example, that we are considering a suggestion of *previous provocation*. To found any claim for indulgence, the provocation must have been 'recent'; it must have been received during the same quarrel. But what constitutes the same quarrel? So far as an injury is concerned, what ought we to regard as 'recent'? Lines of demarcation must, of course, be drawn. 'Let not the sun go down upon your wrath': so runs the Scriptural precept. Sleep ought to calm the transports of passion, the fever of the senses, and to prepare the mind for the influence of the tutelary motives. In the case of homicide, a natural period such as this might, perhaps, serve to distinguish between premeditated and unpremeditated action.

In the case of *drunkenness*, we must carefully inquire whether an intention to commit the offence existed beforehand; whether the appearances of intoxication be feigned or genuine; whether the man got drunk for the express purpose of giving himself courage to commit the crime. The repetition of offences committed when in a state of intoxication ought, perhaps, to deprive an offender of any excuse founded on this plea; for a man, who knows from experience that wine makes him dangerous, does not deserve any indulgence in respect of excesses into which he may be led by the abuse of alcohol.

The law of England does not admit drunkenness as a ground of extenuation: that would be, it is said, to excuse one crime by another. The doctrine seems to me harsh and ill-considered morality: it flows directly from the ascetic principle<sup>1</sup>—that austere and hypocritical principle which a certain section of society fancy themselves under

<sup>1</sup> The law nowadays adopts a more rational attitude in this matter. The presumption that a man is taken to intend the natural consequences of his acts may be rebutted by evidence that, at the time when the

obligation to maintain, though everybody else makes haste to forget its existence.

**Infancy.**

As to *infancy*, we are not concerned with the tender age at which a child could not be held responsible for his actions. At such an age punishment would be ineffective; there is no need of extenuation, for there is really no offence. What useful purpose could be served by punishing, under judicial decree, a baby four years of age for the crime of arson ?

Within what limits, then, should we confine this ground of extenuation ? A reasonable limit would seem to be the period at which a youth is deemed to be sufficiently mature to emerge from wardship and become his own master. Before that time it is not thought that his capacity is ripe enough for the administration of his own affairs. Why should not the law fix the same limit in the two cases ? We do not mean that the ordinary penalty should be lessened in the case of every offence committed before this age is reached; the diminution must depend on a consideration of all the surrounding circumstances. But what we mean is that, after the limit is passed, it should no longer be possible to diminish the punishment under any plea of infancy.

Under such a plea it is mainly infamous penalties that will be remitted; for a youth, who was left no hope of redeeming his good name, would hardly be likely to make efforts for the recovery of his virtue.

When I speak of this age of maturity, I do not intend the age of majority fixed by the Romans at twenty-five years; since it is both foolish and unjust to retard for so long a time the exercise of liberty, and to keep a man in the bonds of childhood after the full development of his faculties. The limit I had in view was the English period

acts were committed, his mind was so affected by drink as to render him incapable of forming the intent. See *R. v. Meade*, [1909], 1 K.B., 895; 78 L.J., K.B., 476. (C. M. A.)

of twenty-one years. Before that age, Pompey had conquered provinces; while Pliny the younger had, with great renown, maintained at the bar the rights of his fellow-citizens. We have ourselves seen Great Britain governed for years by a Minister<sup>1</sup> who controlled its infinitely complicated system of finance with distinction long before the age at which, in some European countries, he would have been allowed to dispose of a single acre of land.

<sup>1</sup> The younger Pitt was Chancellor of the Exchequer in 1782; he was born in 1759. Pompey, born 106 B.C., fought, under his father, in the civil wars when only seventeen years of age; and, on his return victorious from Africa seven years later, Sulla allowed him to enter Rome in triumph—an honour unparalleled in the case of so youthful a conqueror. Pliny the younger was born A.D. 61, and, when only eighteen years of age, began to speak in the Forum. It was his pride to plead the cause of injured provincials. (C. M. A.)

## CHAPTER XII.

### CASES IN WHICH THERE IS NO ALARM.

**No 'fear,'  
no 'alarm.'** IN a case where the only persons exposed to any possible danger are insusceptible of fear, there can, of course, be no 'alarm' whatsoever.

**Infanticide.** This circumstance explains the insensibility of many nations in regard to infanticide—that is to say, the slaughter of a newborn child with the consent of its father and mother. I add with their *consent*; for, in the absence of such consent, the 'alarm' would be almost the same as if the victim were an adult. The less the susceptibility of children to fear for themselves, the more readily is the tenderness of parents prompted to alarm on their account.

I do not seek to justify nations who pursue this practice. Some act with even greater barbarity in giving to the father the right to make away with a newborn babe without the consent of the mother, who, after all the perils of childbirth, finds herself robbed of her reward, and reduced to the position of a degraded drudge:—of no more account than those lower animals whose fecundity happens to prove troublesome to us.

Infanticide, such as I have defined it, can hardly be punished as a principal offence, seeing that it does not produce evil either of the first or of the second order; but it certainly ought to be punished as a step leading in the direction of such an offence, and as furnishing a damaging indication of the character of those responsible for its commission.

Regard for humanity is a sentiment that cannot receive too much encouragement: it is impossible to instil into the mind too great a repugnance against everything which conduces to habits of cruelty. Infanticide, then, should be punished by branding it with some mark of disgrace. Its cause is usually to be found in the dread of a shameful exposure: it will need some still greater stigma to repress it. But at the same time we ought to make the occasions of punishment very rare, by insisting on strict proof of guilt such as it is not easy to obtain.

Under the pretext of humanity, the laws against this offence have manifested a flagrant violation of that principle. Compare the mischief of the crime with the mischief of the penalty. What is the crime? Causing the death, if so it can be called, of a babe who, in fact, ceases to breathe before knowing what it is to exist—an event which cannot arouse the smallest disquiet in the most timid mind, or excite any regret save in the breast of the poor creature who, impelled by shame and pity, was unwilling to prolong a life begun under such unhappy auspices. Now, what is the penalty for this crime? A barbarous punishment—an infamous death inflicted on the unfortunate mother, whose very offence displayed her excessive sensibility; on a woman who, distraught in her despair, has wronged no one but herself by hardening her heart against the most seductive of all natural instincts. Because she feared shame too much, the laws devote her to ignominy; and the lives of those who loved her and survive her they embitter with undying memories of sorrow and disgrace.

Now, if the legislator were himself the primary cause of all this misery, if he may justly be regarded as the real murderer of such poor innocents, how much more odious still would his rigour appear! And yet it is he alone who, by undue severity directed against a frailty worthy of all indulgence, has aroused in a mother's heart this desolating struggle between tender love and burning shame.

Condemnation of a  
cruel  
Penalty  
under pre-  
text of  
Humanity.

## CHAPTER XIII.

### OF CASES IN WHICH THE DANGER IS IN EXCESS OF THE ALARM.

**Danger is  
sometimes  
in excess of  
Alarm.**

ALTHOUGH the 'alarm,' generally speaking, corresponds with the actual 'danger,' there are cases in which the proportion is not observed; the danger may, in fact, be greatly in excess of the alarm.

This occurs in the case of mixed offences, which involve a private mischief and likewise a danger attaching to them in their character of public offences.

It might well happen that a Sovereign should be pillaged by his Ministers of State, and the people harassed by the oppression of subordinate officials. A solid and threatening phalanx of accomplices would suffer nothing to reach the royal ears but mercenary tributes to the virtues of these speculators; while it would be accounted the greatest of crimes to reveal the truth. Under the guise of prudence, cowardice would soon become the national characteristic; and if, in the midst of this general abasement, some virtuous citizen should pluck up courage to denounce the guilty ones and become the victim of his own zeal, the untoward fate of this worthy man would excite very little concern. His self-sacrifice would appear nothing but an act of folly; and everyone, promising himself not to do the like, would be quite unruffled by a disaster such as he could make sure of escaping. But, while 'alarm' is thus set at rest, it makes way for a mischief of even greater moment—that is to say, the danger of impunity for all public offences, the discontinuance of all voluntary aid to the administration

of justice, the profound apathy of the individual citizen in regard to everything not directly personal to himself.

It is said that, in certain of the Italian States, men who have borne testimony against thieves and brigands, being exposed to the vengeance of a gang of their accomplices, have been driven to seek in flight a security which the law was powerless to afford them. In such circumstances it is more perilous to lend assistance to justice than to take up arms against it; a witness runs greater risk than an assassin. The alarm which results from a situation of this kind is, no doubt, slight, inasmuch as no man need ever expose himself to the evil that follows an appearance as witness in the courts; but, in proportion as alarm diminishes, the danger of brigandage is increased.

## CHAPTER XIV.

### GROUND'S OF JUSTIFICATION.

Justification  
of  
offences.

WE now propose to discuss certain circumstances which, when connected with an offence, may serve to deprive it of its mischievous properties.<sup>1</sup> We may give to such circumstances a common description as 'grounds of justification,' or, more briefly, 'justification.'

General justifications, such as are applicable to almost every class of offence, may be reduced to the following heads: (a) Consent; (β) The repelling of some more serious mischief; (γ) Medical practice; (δ) Self-defence; (ε) Political authority; (ζ) Domestic authority.

Now, how can these circumstances furnish a justification? We shall see that sometimes they may afford evidence of an entire absence of mischief; at other times they may make it clear that the mischief has been compensated—that is to say, more good than harm results from the commission of the act in question. We are here concerned solely with evil of the first order; for in every one of these cases evil of the second order is altogether absent.

I confine myself to some general observations, and will speak first of—

Consent.

(a) *Consent*.—The consent referred to is the consent of the person who would suffer the evil, if there were any. Since there is consent to the act, what can be more natural than to assume that no evil attends it, or, at any rate, that any attendant evil has been completely compensated? We therefore accept the general maxim of the lawyers: *Volenti non fit injuria*. This rule is based on two extremely

<sup>1</sup> Cf. the definition of an 'offence,' *ante*, vol. ii., pp. 1, 2.

simple propositions: first, that every man is the best judge of his own interests; secondly, that a man would not consent to an act which he believes to be harmful to himself.

The rule, of course, admits of many exceptions, the reasons for which are manifest: Undue coercion; Fraud; Unfair concealment; Consent no longer operative through lapse of time or express revocation; Madness; Drunkenness; Infancy.

(β) *The Repelling of some more Serious Mischief.*—This relates to cases in which evil is done that some greater evil may be averted. It is to this ground of justification that we must refer the extreme measures to which it may be necessary to resort, when dealing with contagious diseases, or in times of siege, famine, storm, or shipwreck. *Salus populi suprema lex.* Repulsion of greater mischief.

But the more serious a remedy of this nature, the more obvious must be the necessity for its application. The welfare of the State has served as the pretext for many a crime. To justify such an expedient, three essential points must be established—the certainty of the evil sought to be avoided; the total absence of any other and less costly expedient; the indisputable efficacy of the particular expedient that is to be employed.

It is on this ground that we must seek to justify the killing of a tyrant, if, indeed, such an act is capable of justification. But it is not; for there is no necessity to slaughter a hated tyrant—we need only desert him, and he is lost. James II. was forsaken by everybody, and the revolution was accomplished without the shedding of blood. By means of a simple decree of the Senate, Nero saw the whole of his power pass away;<sup>1</sup> while the death, that he was driven to inflict by his own hand, proved a more terrible lesson to tyrants than if it had been dealt him by the sword of a Brutus. Greece boasted her Timoleon;<sup>2</sup> but Killing tyrants.

<sup>1</sup> Cf. Merivale's *History of the Romans under the Empire*, vol. vii, p. 47. (C. M. A.)

<sup>2</sup> To preserve the liberty of their native city, Timoleon slew his brother Timophanes. (C. M. A.) w3

**Killing  
tyrants—  
could.**

we may see, in the convulsions which so constantly threatened her overthrow, how ill tyrannicide served its purpose. It succeeded in enraging the distrustful despot, and the more craven he was the more ferocious he became. When the blow failed, the vengeance was appalling. What happened if the tyrant fell? In democratic States, factions from that moment resumed their furious strife, and the party that prevailed wrought the very evils of which they had been in dread. In monarchies, the dismayed successor harboured profound resentment; and if he made heavy the people's yoke, he had a plausible pretext for disguising his mischievous conduct under the cover of protective measures.

The penetrating eye of Sylla, so they say,<sup>1</sup> perceived more than a Marius in a certain voluptuous youth, as yet famous only for his debauchery. He discovered, lurking beneath the yielding softness of a woman's manners, the raging fires of overweening ambition; and he looked upon these dissolute pleasures as a mere cloak to cover the young man's project for placing his country at his feet. Now, on the strength of this suspicion, would Sylla have been justified in putting Cæsar to death? If so, an assassin has but to assume the rôle of a prophet in order to excuse his crime. Would a knave, who pretends to read the hearts of men, be permitted to invoke the name of Heaven and slay all his enemies for crimes not yet committed? Under pretence of avoiding an evil, this would amount to working the greatest of all evils, for it would mean the complete destruction of general security.

<sup>1</sup> When Sulla was made Consul for the year 88, Marius appealed to the people, and contrived to get the command in Asia transferred from Sulla to himself. Sulla fled to the army, but returned and seized the city of Rome, whereupon Marius escaped to Africa. Cinna, chosen one of the Consuls in 87, procured the recall of Marius, who was (with Cinna) once more named as Consul for 86. Cæsar, nephew by marriage of Marius, refused to obey Sulla's command to divorce Cornelia, daughter of the democratic leader Cinna. The story runs that Sulla said: 'That young fop (Cæsar) will some day be the ruin of the aristocracy, for there are many Mariuses hidden in him.' (C. M. A.)

(γ) *Medical Practice*.—This ground of justification is really comprised in the preceding one: an individual is made to suffer for his own good. A man is seized with apoplexy; must we await his consent before bleeding him? No doubt can arise in one's mind as to the lawfulness of treatment, seeing that we know well enough that he has no wish to die. The case is very different where a man, master of all his faculties and in a condition to give consent, sees fit to refuse it.<sup>1</sup> Shall we confer on his friends or on his physicians the right to force him to submit to an operation which he declines to undergo? That would be to substitute an undoubted evil for a danger almost fanciful, as being very unlikely to arise. Terror and distrust would keep ceaseless vigil by the sick man's bed. Indeed, if a physician, under the dictates of humanity, were to go beyond his rights, and his efforts were to miscarry, he ought to be exposed to the rigour of the law, and his good intentions should, at the most, be treated as an extenuation of his offence.

(δ) *Self-Defence*.—This, again, is a modification of the ground (β). In effect, we are concerned only with the repelling of a more serious evil; for, were you to slay ten lawless assailants, their death would be a gain to society, whereas the loss of one upright and amiable man is a great evil. This right of defence is absolutely necessary. The vigilance of magistrates could never supply the place of that watchful care which every individual takes on his own behalf. Bad men would never be restrained as effectively by mere fear of the laws as they are by fear of the resistance of individuals in the aggregate. Take away this right, then, and you become an accomplice of the base and the mischievous.

Now, this ground of justification has its limits. One must not resort to an assault except in defence of one's person or one's property. Mere words, however injurious,

<sup>1</sup> Cf. questions raised as to the 'forcible feeding' of prisoners in English gaols in 1913. (C. M. A.)

Self-  
Defence—  
contd.

must not be resented by blows; that would no longer be self-defence, it would be vengeance.

And, again, we shall overstep the legitimate bounds of self-defence if we deliberately do an evil which is irreparable in order to avoid one which is not so.

But is it only oneself that one may defend? Ought we not to enjoy a right to protect our fellows from lawless aggression? The righteous indignation, which is kindled at the sight of the strong ill-treating the weak, is surely a noble impulse of the human heart. It is a noble impulse, too, which prompts us to forget our own personal risk and rush to render aid when we hear the first cry of distress. The law must beware lest it loosen the bonds that form this generous alliance between courage and humanity: let it rather give all honour and reward to him who plays the part of magistrate in the interests of the oppressed. It deeply concerns the common weal that every honest man should look upon himself as the natural protector of each one of his fellows. In such cases there can, of course, be no possible evil of the second order.

Authority:  
political  
and do-  
mestic.

(ε) and (ζ). *Political and Domestic Authority*.—The exercise of any form of lawful authority imports the necessity of doing evil in order to obviate or repress some greater evil. Lawful authority may be either of a *political* or of a *domestic* character. Neither the magistrate nor the father (or other person occupying the position of the father) could maintain his authority—the one in the State, the other in the family circle—unless he were armed with coercive expedients against disobedience. The evil which he inflicts is designated punishment or chastisement. The welfare of the large or the small community (as the case may be) over which he presides is the sole object of every penalty; and it need hardly be said that the exercise of lawful authority affords ample justification for inflicting the penalty, since no one would perform the duties of a magistrate or of a father unless he were assured of protection in the discharge of his functions.

## PART II.

### POLITICAL REMEDIES FOR THE EVIL OF OFFENCES.

#### CHAPTER XV.

##### SUBJECT OF THIS BOOK.

HAVING considered offences as *diseases* in the body politic, we are led by analogy to regard as *remedies* the various means employed for their prevention and reparation.

These remedies may be arranged in four classes: (a) Preventive remedies; (β) Repressive remedies; (γ) Compensatory remedies; (δ) Penal remedies, or punishments. Four cl.  
of Remedies.

(a) *Preventive Remedies*.—By this I mean the expedients employed to prevent crime. Of these there are two kinds: Direct means, which have immediate application to such and such a particular offence; indirect means, which consist of general precautions against the commission of a whole class of offences.

(β) *Repressive or Suppressive Remedies*.—These are expedients which tend to put a stop to an offence already begun—an offence in course of commission but not yet completed—and consequently to prevent, at any rate, a portion of the evil.

(γ) *Compensatory Remedies*.—I apply this phrase to the various forms of reparation and indemnity accorded to an innocent person in respect of the wrong that he has suffered through an offence.

Remedies  
for  
Offences—  
contd.

(δ) *Penal Remedies, or Punishments*.—When the evil has been brought to an end and the party injured has been indemnified, it yet remains to prevent the commission of similar crimes, whether on the part of the same offender or of some other person. Now, there are two ways of attaining that object: the one by influencing the will, the other by taking away the power, to injure.<sup>1</sup> The will is affected by fear; power is taken away by some physical act. To take away from an offender the will to offend again is to reform him; to take away the power to offend again is to incapacitate him. A remedy intended to operate through fear is called a *punishment*; whether it has or has not the effect of incapacitating depends upon the nature of the particular punishment.

The principal end of punishment is the prevention of like offences. What has already happened is, as it were, a mere point in space, while the future extends to infinity. The offence already committed may well concern but a single individual, while similar offences may affect everybody. In many cases the mischief wrought is irreparable; but we can always get rid of the will to repeat it, for, however great may be the advantage accruing from the crime, the evil of the punishment may always be made to countervail it.

These four kinds of remedies at times require as many separate operations, though on occasion the same operation will suffice for the application of all.

In this book we shall discuss direct preventive remedies, repressive or suppressive remedies, and compensatory remedies. Punishments will be treated in Part III., while Part IV. will be concerned with the indirect methods of preventing offences.

<sup>1</sup> Cf. *Théorie des Peines*, vol. i., chap. i. (Bowring. *Rationale of Punishment*, vol. i., p. 390 *et seq.*). (C. M. A.)

## CHAPTER XVI.

### OF DIRECT METHODS OF PREVENTING OFFENCES.

It may well be that, some time before an offence is actually perpetrated, we can foresee that it is likely to be committed. There are various stages of preparation during which an opportunity frequently offers for staying its commission before the catastrophe is reached.

Direct  
modes of  
Prevention.

This police function may be exercised either through powers conferred on the public at large, or through special powers conferred on persons invested with peculiar authority.

Ante-ju-  
dicial Ex-  
pedients.

The powers entrusted to the general body of citizens for their own protection are such as are exerted before any intervention by officers of justice, and may therefore be styled *ante-judicial* expedients. To this class must be assigned the right to oppose by open force the commission of a suspected crime, to seize the suspected person, to retain him in custody, and hale him before the magistrate; to demand assistance; to deposit in the hands of responsible persons any article supposed to be stolen, or of which the destruction is apprehended; to detain the bystanders as witnesses, and to call upon anyone at hand to give aid in carrying before the authorities a man suspected of mischievous designs. An obligation to render such services may well be imposed on every citizen, and he should be required to discharge them as one of his most important social duties. Indeed, it would be desirable to ordain rewards for those who have assisted in the prevention of crime, and in delivering the guilty person into the hands of justice.

It may be urged that such powers are capable of abuse, and that rogues might bring them into play to procure assistance in the perpetration of some rascally action. But is not the risk rather fanciful? This pretence of a desire to promote order, and the publicity occasioned thereby, would be calculated to thwart their designs and expose them to very obvious danger. Indeed, it is true, generally, that there is little risk in granting rights which can never be exercised without exposure to the various ill-consequences that ensue when they are abused. To refuse justice the assistance it could derive from such expedients as these would be to submit to an irreparable evil, through fear of an evil which would redress itself.

Other  
expedients  
in the  
hands of  
the magis-  
tracy.

Quite apart from these powers, with which everyone should be invested, there are others that are of great use in the prevention of apprehended offences, but they should be conferred only on the magistracy.

(a) *Admonition*.—This is a simple lesson, but one given by a judge. It serves as a warning to the suspected person by pointing out to him that he is under observation, and that he is being recalled to his sense of duty by an authority to whom it would be well for him to give heed.

(β) *Threats*.—This is the same expedient, strengthened by adding the menace of the law. In the one case, it is a father's voice assuming a tone of persuasion; in the other, it is that of the magistrate inspiring fear by the severity of his rebuke.

(γ) *Exactng a Promise to keep away from a Certain Place*.—This method, applicable to the prevention of many offences, is specially adapted to quarrels, personal affronts, and seditious intrigues.

(δ) *Partial Banishment*.—This consists in forbidding the suspected person to come into the presence of the party threatened; to be seen in the precincts of his house; or to repair to any other assigned spot intended, or likely, to become the scene of crime.

(*ε*) *Bail*.—That is to say, an obligation to procure sureties, who undertake to forfeit a given sum in the event of the suspected person contravening the requirements as to withdrawal from particular places.

(*ζ*) The establishment of *guards* or *keepers* for the protection of persons or property threatened with injury.

(*η*) *Seizure* of arms or other instruments intended to be used in the commission of the apprehended offence.

Besides these general expedients, there are others which are peculiarly adapted to certain special offences. I shall not here enter upon these details of police and administration. The choice of methods, the occasion and manner of their application—all this depends on a vast number of circumstances. Moreover, the various expedients are simple enough, and are almost always indicated by the nature of the case. Suppose, for example, we are concerned with injurious defamation: the writings should be seized before their publication can take place.<sup>1</sup> As to noxious food, drink, or drugs, they should be destroyed before they can be consumed.<sup>2</sup> Judicial visits and inspections will serve to prevent fraudulent and clandestine acts,<sup>3</sup> or the traffic in contraband goods.

Cases of this type rarely admit of precise rules: something must necessarily be left to the direction of public officials and judges. But the legislator should give them such instructions as will prevent any abuse of arbitrary power.

General  
rule ap-  
plicable to  
preventive  
expedients.

These instructions should be based upon the following maxims. The more rigorous the expedient, the more scrupulous must we be in employing it. We may go farther, in point of rigour, in proportion to the magnitude

<sup>1</sup> Cf., e.g., the Obscene Publications Act, 1857 (20 and 21 Vict., c. 83, s. 1). (C. M. A.)

<sup>2</sup> Cf., e.g., the Public Health Act, 1875 (38 and 39 Vict., c. 55, ss. 116, 117), as to unsound meat, etc. (C. M. A.)

<sup>3</sup> Cf., e.g., the Weights and Measures Act, 1878 (41 and 42 Vict., c. 49, s. 48). (C. M. A.)

of the offence apprehended and its apparent probability; in proportion also as the offender seems more dangerous, and as the means for accomplishing his evil designs are more ample. But there is one limitation which no judge should ever be suffered to ignore: 'Never make use of any preventive expedient which is of a kind to work more mischief than arises from the offence itself.'

## CHAPTER XVII

### OF CHRONIC OFFENCES.

BEFORE treating of suppressive or repressive remedies—that is to say, the expedients for putting a stop to offences in course of commission—let us see, first of all, what offences there are which can be so stopped. For it is not every offence which admits of such a remedy; while those which do admit of it cannot all be dealt with in the same way.

The power to stop presupposes a duration sufficiently The duration of offences. lasting to allow justice to intervene; and all offences have not such duration. Some offences have a transient effect, others an effect which is permanent: murder and rape are irreparable; larceny may be of a momentary character, though it may prove lasting, as where the stolen article is lost or destroyed.

We must needs distinguish the circumstances which Circumstances affecting Duration. determine the greater or less duration of offences, because they affect the suppressive expedients respectively applicable to the several offences.

(a) First kind of chronic offence, *ex actu continuo*: an offence may acquire duration by the mere continuance of an act which, though it might cease at any moment, would nevertheless have already constituted the offence. The detention of a person and the concealment of a chattel or a will are illustrations of such an offence.

(β) Second kind of chronic offence, *ex intentione persistente*: whenever the mere intention to commit a crime is regarded as an offence in itself, it is manifest that so

Circum-  
stances  
affecting  
Duration—  
considered.

long as the intention persists the offence will continue. This class is really comprised in class (a).

(γ) Third kind of chronic offence, *ex actu negativo* : negative offences—in other words, such offences as consist of omissions—for the most part possess duration. Consider, for example, the omission to provide for the support of one's child, to pay one's debts, to appear when summoned before a court of justice, to discover one's accomplices, or to place a man in the enjoyment of a right which belongs to him.

(δ) Fourth kind of chronic offence, *ex opere manente* : there are certain material structures, the very existence of which constitutes a continuous offence. We may cite as illustrations a manufactory injurious to the health of the neighbourhood, a building obstructing a highway, a dam interrupting the flow of a river.

(ε) Fifth kind of chronic offence, *ex scripto et similibus* : productions of the human mind, through the intervention of printing, may be marked by similar characteristics. Such are libels, false histories, alarming prophecies, obscene prints—in a word, whatever presents to the populace, in a durable form, ideas which ought not to be presented to them.

(ζ) Sixth kind of chronic offence, *ex habitu* : a sequence of repeated actions may, when viewed collectively, acquire a character of unity, by virtue of which their author is said to have contracted a habit.<sup>1</sup> Such are the coining of base money, forbidden processes in manufacture, contraband traffic in general.

(η) Seventh kind of chronic offence, *ex occasione* : there is a kind of duration in certain offences which, though they are distinct, yet assume a character of unity, inasmuch as one has been the occasion of another. Suppose, for example, that a man plays havoc in a garden, thrashes the occupier who tries to stop him, pursues him into his

<sup>1</sup> Cf., e.g., Post Office Act, 1908: 'If any person is in the practice of doing any of the said things, he shall forfeit, for every week during which the practice is continued, £100' (s. 34 [v.]). (C. M. A.)

house, insults the household, damages the furniture, kills a favourite dog, and commits further depredations.

(θ) Eighth kind of chronic offence, *ex co-operatione*: there is a kind of duration to be implied from the fact that a number of offenders, whether with or without concert, seek the same end. Thus, from a confused medley of acts of destruction, threatening and abusive cries, personal injuries, insulting shouts, and provocative challenges, there is formed the dread and deplorable compound known as tumult, riot, insurrection—certain forerunners of rebellion and civil war.

Chronic offences are apt to lead to a catastrophe, the offence projected culminating in the offence consummated. Slight corporal injuries may have, as a natural result, irreparable corporal injury and homicide. Suppose we are concerned with an act of wrongful imprisonment. There is no crime which may not be its object; to sever an inconvenient matrimonial tie, to accomplish some scheme of seduction, to suppress evidence, to extort a secret, to defeat a claim to an estate, to secure compulsory aid in some act of outrage—in a word, imprisonment may always tend to some special catastrophe, such as will accord with the design of the offender.

Chronic  
offence  
may cul-  
minate in  
catastrophe.

In the course of a criminal enterprise, the end in view may change as well as the means to be employed. A thief, surprised in the act, may, through fear of punishment or chagrin at the loss of his booty, become an assassin.

The foresight of the magistrate should, in every case, keep before his mind's eye the probable catastrophe of a crime, so that he may seek to avert any such catastrophe by some interposition, at once prompt and well-directed. In fixing the penalty he must pay due regard to the intentions of the criminal; but, in the application of preventive and suppressive remedies, he must take into account all the probable consequences, as well those actually intended as those disregarded or unforeseen.

## CHAPTER XVIII.

### OF SUPPRESSIVE REMEDIES FOR CHRONIC OFFENCES.

**Suppressive  
Remedies.**

THE various species of chronic offences call for various repressive or suppressive remedies. These suppressive expedients are the same as the preventive expedients of which we have already given a catalogue:<sup>1</sup> the difference lies only in the time and mode of application.

There are cases in which the remedial expedient corresponds so manifestly with the nature of the offence that it is hardly necessary to indicate it. It is plain enough that wrongful imprisonment calls for release, while theft requires restoration in kind. The only difficulty is to know where to find the thing or the person detained.

There are other offences, such as seditious gatherings and certain negative offences, in particular the non-payment of debts, which can only be suppressed by the employment of more unusual expedients. We shall take occasion to examine them under their appropriate heads.

The mischief arising from dangerous writings is one extremely difficult to overcome. They lie hidden, and, after proscription of the most pronounced type, they often reappear and are distributed more widely than ever. When we come to treat of 'indirect methods,' we shall see the most effective mode of combating this mischief.

Magistrates must be allowed more latitude in the employment of suppressive methods than in the use of preventive expedients. The reason is obvious. If it is a question of suppressing an offence, there is an offence

Court  
should  
enjoy  
greater  
latitude  
than in  
cases of  
mere pre-  
vention.

<sup>1</sup> Chap. xvi., *ante*, vol. ii., p. 50. (C. M. A.)

actually proved, and consequently a punishment duly appointed. There can, then, be no risk of going too far in the attempt to stop such an offence, provided that we do not go beyond what would be necessary to punish it. But, if it is merely a question of preventing an offence, we cannot be too scrupulous in our action. Perhaps there is really no intention of committing any such offence at all; perhaps we are mistaken as to the individual who harbours the intention; perhaps the suspected person is, in fact, acting from some good motive, or, instead of consummating the offence, will stay his hand of his own accord. All these possibilities conspire to demand a course of procedure milder and more carefully regulated in proportion as the apprehended offence is more problematical.

For the prevention or suppression of wrongful imprisonment and unlawful deportation there are special expedients which may be reduced to the precautions following:

Wrongful imprisonment and unlawful abduction.

(a) Keeping a register of every kind of house in which persons are detained against their will, such as prisons, asylums for madmen and idiots, and private institutions for the reception of the insane.

(b) Keeping a second register containing the cause of detention in each case, no person of unsound mind being allowed to be detained until a judicial consultation of physicians has taken place and a certificate under their hands has been obtained.<sup>1</sup> These two registers should be kept in the district courts, and openly exposed, or at least be open to public inspection.

(c) Arranging some signal (which shall, so far as possible, be available to any person who is being forcibly carried

<sup>1</sup> To prevent abuses incident to the control of lunatics, a statute, 14 Geo. III., c. 49 (made perpetual by 26 Geo. III., c. 91), had been passed for regulating private madhouses. But at the beginning of the nineteenth century persons deprived of their reason were largely dealt with under the Vagrant Acts, whereby a method was prescribed for imprisoning, chaining, and 'sending them to their proper homes.' (C. M. A.)

off) conferring on any passer-by authority to call the ravishers to account; requiring him to attend them if they announce a wish to take the person detained before a magistrate, and to convey them thither by force in case they do not evince any such desire.

(δ) Granting to everybody the right to make application to a court of justice for liberty to search any house in which it is suspected the person sought for is detained against his will.<sup>1</sup>

<sup>1</sup> *Cf.*, *e.g.*, the provisions contained in the Criminal Law Amendment Act, 1885 (ss. 8, 10), directed against the detention of females for improper purposes. See, too, the Mental Deficiency Act, 1913, which (by s. 15 [ii.]) enables search to be made for 'a defective,' under a warrant issued by a justice, authorising a constable to 'enter, and if need be by force, any house, building, or other place specified in the warrant.' (C. M. A.)

## CHAPTER XIX.

### OF MARTIAL LAW.

IN case of seditious assembly, it is not the practice, in England, to begin by calling upon the soldiery to butcher the mob. A solemn warning precedes punishment; martial law is proclaimed,<sup>1</sup> and the soldier cannot act until the magistrate has spoken.<sup>2</sup>

*The Riot Act, 1714.*

The intention of this law is excellent; but what of its execution? The magistrate is required to resort to the place and, in the midst of the tumult, to pronounce a long-drawn-out formula which nobody understands; and woe betide those who are found on the spot an hour afterwards! They are declared guilty of a capital offence.<sup>3</sup> This statute, a peril to the innocent and difficult to put into operation against the guilty, is a compound of weakness and violence.

At such a moment of confusion the magistrate should announce his presence by some extraordinary signal. The red flag, so conspicuous during the French Revolution, produced a great effect on the imagination. In the midst

*Defects in English procedure.*

<sup>1</sup> This is in the nature of a rhetorical flourish. Martial law cannot be exerted in time of peace; it is, as Sir Matthew Hale observes, in truth and reality no law at all, but something indulged rather than allowed as a law. The reference is to the Riot Act of 1714 (1 Geo. I., st. 2, c. 5), applicable in cases where persons to the number of twelve or more are riotously and tumultuously assembled to the disturbance of the public peace. (C. M. A.)

<sup>2</sup> But, to justify the exercise of military force in the prevention of serious outrage and damage, it is not necessary to wait for the proclamation to be read (*cf. King's Regulations*, 'Duties in Aid of the Civil Powers,' No. 280). (C. M. A.)

<sup>3</sup> The maximum penalty is now penal servitude for life. (C. M. A.)

of general uproar, the everyday expedient of language is not enough. The mob has eyes, but no ears; so it is to their eyes that we must address ourselves. A set harangue presupposes silence and attention; while visible signs work quickly and with striking effect. Such signs tell their whole story in a moment; they convey but a single, and quite unequivocal, meaning; no din deliberately contrived, no concerted uproar, can destroy their efficacy.

Besides, the influence of the spoken word may be defeated by a host of unforeseen circumstances. Perchance the speaker is personally disliked, so that, in his mouth, even the language of justice becomes hateful. Perchance there is something absurd about his character, his bearing, the manner in which he begins his harangue—the ridicule will extend to his functions and tend to render them contemptible. One reason the more for speaking to the eyes by symbols that will insure respect and are not subject to such whims and caprices.

But, as it may become necessary to supplement the signs by spoken words, a speaking trumpet is an essential accompaniment. The very singularity of this instrument will contribute a certain *éclat* and dignity to the injunctions of justice, and will banish all idea of familiar conversation, while adding to the impression that the voice is the voice of a privileged Minister, the herald of the Law, not that of a mere humble individual.

This method of making oneself heard from afar has long been employed at sea, where distance, combined with the roar of the waves and the tempest, caused the insufficiency of the human voice to become evident at a very early period. The poets have often compared a people in time of tumult with a stormy sea. Why should the analogy be limited to the purposes of literature and art? It is capable of a much more useful and important application in the hands of justice.

The orders should be conveyed in very few words: there

should be nothing which savours of debate or of common discourse. Let it not be 'by command of the King': <sup>'By the King's command.'</sup> speak in the name of Justice. The head of the State may, rightly or wrongly, be an object of aversion: nay, that very aversion may be the cause of the tumult, and to recall it to the minds of the mob may be to inflame their passions rather than to allay them. If, on the other hand, the King be not unpopular, the use of his name may make him so. Everything which is in the nature of a favour, or bears the impress of pure benevolence, should be presented as the personal work of the father of his people; while as to all acts marked by rigour or by a kindliness mingled with severity—well, they need not be attributed to anybody in particular. Assign them to some convenient figment, some animated abstraction—such as 'Justice,' daughter of necessity and mother of peace, whom men should fear but cannot hate, who has, by common consent, the first claim to their homage: let the hand which sets all in motion be ever kept artfully hid.

## CHAPTER XX.

### OF THE NATURE OF SATISFACTION OR COMPENSATION.

WHAT is 'Satisfaction'? A benefit received in consideration of some damage sustained. When spoken of in relation to an offence, it is an equivalent given to the injured party on account of the injury he has suffered.

Plenary  
Satisfac-  
tion.

Satisfaction is 'plenary' or 'full' if, on compiling two aggregates, one of the evils undergone, the other of the benefits conferred, the value of the second appears equal to the value of the first; in such sort that, if the injury were to be repeated and the same reparation were to follow, the event would seem indifferent to him on whom the wrong was inflicted. But if something is wanting to make the aggregate value of the benefits equal to the aggregate value of the evils, the satisfaction is but partial and imperfect.

Indemnifi-  
cation for  
the past;  
Satisfac-  
tion for the  
future.

Satisfaction has two branches, as it may be viewed from two aspects, the *past* and the *future*. Satisfaction for the past is what is called *indemnification*. Satisfaction for the future consists in putting an end to the evil of the offence. In case the evil ceases of itself, nature has discharged the functions of justice, and the courts, in this regard, have nothing further to do.

Suppose that a sum of money has been stolen. So soon as it has been restored to the owner, satisfaction for the future is complete: it only remains to indemnify him for the past, for the temporary loss he has undergone during the pendency of the offence.

But, if we are concerned with an article which has been spoiled or destroyed, satisfaction for the future can only be made by giving to the injured party a chattel which is similar or of equivalent value. Satisfaction for the past consists in an indemnity for the temporary privation already undergone.<sup>1</sup>

<sup>1</sup> In the case of offences under the Larceny Act, 1861, the Court has now power to award writs of restitution for the property stolen or wrongfully obtained, or to order the restitution thereof in a summary manner. Again, under the Forfeiture Act, 1870, after a conviction for felony, there is power to award a sum not exceeding £100 by way of satisfaction or compensation for loss of property, and this sum is recoverable as a judgment debt from the person convicted. See, too, the Probation of Offenders Act, 1907, s. 1 (iii.). (C. M. A.)

## CHAPTER XXI.

### REASONS UPON WHICH THE OBLIGATION TO MAKE SATISFACTION IS FOUNDED.

Reasons  
for giving  
Compensa-  
tion.

SATISFACTION, or Compensation, is necessary in order to put an end to evil of the first order, to restore things to the condition in which they were before the commission of the offence, and to remit the sufferer to the state he would have been in had there been no breach of the law.

Satisfaction is even more necessary to put an end to evil of the second order. Punishment alone is not enough for this purpose: it doubtless tends greatly to diminish the number of offenders, but, although diminished, the number could not be treated as insignificant. Cases of crime actually committed excite apprehension, greater or less in degree according as the instances are more or less widely known. Everyone who hears of them feels there is a chance of his being the next victim. If we would banish this apprehension, we must see to it that the offence is followed as regularly by an award of compensation as by punishment. If it were followed simply by punishment without compensation, there would be as many proofs of the inefficacy of the punishment as there were offenders punished; and, consequently, 'alarm,' in proportionable extent, would press heavily upon the community at large.

But we must here make an essential observation. To get rid of the 'alarm,' it is enough that the compensation should appear adequate in the eyes of the observing public, although it may not so appear to the persons primarily interested. How is it possible to judge whether the satis-

faction awarded will seem to be full compensation from the point of view of the man who receives it? In the hands of passion, the balance would always lean to the side of personal interest. To the avaricious man we could never give enough: to the vindictive no award would seem a sufficient humiliation of his adversary. We must, then, suppose an impartial observer, and regard as adequate compensation the sum for which he would, with but slight reluctance, undergo an evil of similar magnitude.<sup>1</sup>

<sup>1</sup> *Compensation or Satisfaction*, out of the surplus accruing from enforced labour, was one of the main ends that Bentham had in view when urging the establishment of his 'Panopticon Penitentiary System.' 'Observe,' he wrote, 'the incongruity, the inconsistency. . . . Where the offence is deemed least enormous, the party injured has his chance of satisfaction for the injury; where it is deemed most enormous and *punished* accordingly, he has no such chance. Not that anything can be more satisfactory to anybody than this arrangement is to Blackstone (Bk. IV., ch. i.). As often as a man is hanged or transported, or kept in a gaol or flogged, satisfaction is thereby given to somebody or to something. This being assumed, what sort of a thing the satisfaction is, or who gets it, is, in the learned commentator's account, not worth thinking about' (Bowring, vol. iv., pp. 199. 200). (C. M. A.)

## CHAPTER XXII.

### OF THE DIFFERENT KINDS OF SATISFACTION.

Various  
forms of  
Compensa-  
tion.

WE may distinguish six kinds:

(a) *Pecuniary Compensation*.—Money, being the means of procuring most pleasures, proves an effectual compensation for many evils. But it is not always within the power of the offender to supply it, nor always suitable for the injured party to accept it. To offer a man, whose honour has been outraged, a sum of money in satisfaction of the insult amounts to a fresh affront (see Chapter XXV., *post*, p. 72).

(β) *Restitution in Kind*.—This form of compensation consists either in restoring the article which has been taken away, or in giving something similar or equivalent to the article taken away or destroyed (Chapter XXVI., *post*, p. 75).

(γ) *Attestative Satisfaction*.—If the evil results from a lie, or from a false expression of opinion on a matter of fact, complete satisfaction may be secured by a legal attestation of the real truth (Chapter XXVII., *post*, p. 80).

(δ) *Honorary Satisfaction*.—This consists in doing something intended to maintain or re-establish, in favour of an individual, some portion of honour of which he has been deprived, or run a risk of being deprived, by the commission of an offence directed against him (Chapter XXVIII., *post*, p. 85).

(ε) *Vindictive Satisfaction*.—Everything which inflicts pain on the offender yields the pleasure of vengeance to the party injured (Chapter XXX., *post*, p. 105).

(5) *Substitutive Satisfaction*, or satisfaction at the expense of a third party; as where a person who has not committed a crime is held responsible, so far as his property is concerned, for him who has in fact committed it (Chapter XXXI., *post*, p. 107).

In choosing the particular kind of satisfaction, we must have regard to three circumstances: the degree of readiness with which it can be supplied; the nature of the evil to be compensated; and the feelings which may be attributed to the party injured. We shall presently return to these various heads with a view to treating them more at large.

## CHAPTER XXIII.

### OF THE QUANTITY OF SATISFACTION TO BE AWARDED.

Adequacy  
of Compens-  
ation.

WHEN the compensation is, in fact, inadequate—that is to say, lacking in completeness—to the same extent precisely does the wrong inflicted remain without remedy. What is required to guard against deficiency in this respect may be expressed in the form of two general rules:

(i.) *Endeavour to track the mischief in every direction and in all its consequences, so that thereby the compensation may be assessed in its due proportions.*

When dealing with irreparable bodily injury, we must remember that both a means of enjoyment and a means of subsistence have been taken away for ever. There cannot, in the nature of things, be compensation of a like kind; but we must seek to remedy the evil by affording the man who has been wronged a lasting payment or some pleasure which constantly recurs.

When dealing with homicide, we must take into account any loss sustained by the kinsfolk of the deceased, and compensate it by a payment, made once and for all, or spread over a period of greater or less extent.

If we are concerned with an offence against property, we shall find from the 25th chapter, which deals with Pecuniary Satisfaction, all that need be done to raise the reparation to the level of the loss.

(ii.) *In case of doubt, see that the balance inclines rather in favour of him who has suffered the injury than in favour of him who has inflicted it.*

All casual and consequential injuries should be laid to

the account of the wrong-doer. Compensation should always be excessive rather than inadequate. If excessive, the surplus, acting in the character of a penalty, could but serve to prevent like offences; while if inadequate, the deficiency always leaves a certain degree of 'alarm,' and we should not forget that, in offences of a vengeful character, any uncompensated injury affords matter of triumph to the offender.

The laws, in all countries, are very imperfect in this regard. In the matter of punishments, unwarranted excess has caused very little consternation; in the matter of compensation, inadequacy has been accepted with composure. Penalties, which when unnecessary are an unmitigated evil, have been strewn with a lavish hand; while compensation, a pure good, has been awarded in most niggardly fashion.

## CHAPTER XXIV.

### OF THE CERTAINTY OF SATISFACTION.

Certainty  
of Com-  
pensation.

THE certainty of obtaining compensation is an essential factor of security; and in proportion as this certainty is wanting, in the like proportion is security diminished.

What are we to think of laws which, to the natural causes of uncertainty, add others purely factitious and created in a spirit of wantonness? To obviate such defects we lay down the two rules following:

Rules to  
promote  
certainty.

(i.) *The obligation to compensate shall not be extinguished by the death of the party injured. Any satisfaction due to the deceased remains owing to those who inherit his fortune.*

To make the right of receiving compensation dependent on the life of the party injured would be to deprive that right of a portion of its value: it is like reducing a perpetual annuity to a mere life annuity. The full enjoyment of such a right can only be attained by a process which may prove of long duration. In the case of an aged or infirm person, the value of the right would be as precarious as his life; while, if the man were about to die, the right would no longer be of any value whatsoever.

Besides, while on the one hand you lessen the certainty of satisfaction, on the other hand you increase the offender's hope of impunity: you hold out to him a prospect of peacefully enjoying the fruits of his crime. You supply him with a powerful motive for delaying, in a thousand ways, the judgment of the court, or for hastening the death of the man whom he has wronged. To say the least, you place beyond the pale of the law's protecting care the

sick and the dying—the very persons who stand in greatest need.

It is true that, even supposing the obligation to compensate were extinguished by the death of the injured party, the offender might be made subject to some other penalty; but what punishment so suitable as this ?

(ii.) *The right of the person injured shall not be extinguished by the death of the offender, the author of all the mischief. Any satisfaction owed by him remains due from those who inherit his fortune.*

To determine otherwise would, again, be to lessen the value of the right and to offer encouragement to crime. It is not very uncommon for a man, who feels the hand of death upon him, to work some injustice with no other object than to advance the fortunes of his children.

It will be said that, if the injured party is compensated after the death of the offender, it can only be by imposing an equivalent loss on the inheritors. But there is a marked distinction to be drawn. The expectation of the party injured is settled, definite, and precise—steadfast in proportion to the man's trust in the protecting care of the laws. The expectation of the inheritor is no more than a vague hope. What does he look for—the whole of the offender's fortune ? No: only a certain unascertained net residue, after all lawful deductions. What the deceased might have consumed in pleasures, he has here expended in wrong-doing.

## CHAPTER XXV.

### OF PECUNIARY SATISFACTION.

Money  
Compensa-  
tion.

THERE are some cases in which pecuniary compensation is demanded by the very nature of the offence; there are others in which it is the only form of compensation the circumstances will allow. It should be preferred on all occasions where it promises to prove most effective.

Pecuniary compensation is supremely appropriate when the damage sustained by the injured party and the gain reaped by the offender are alike of a monetary character, as in cases of larceny, peculation, and extortion. The ill and its remedy are homogeneous; the compensation may be exactly measured by the loss, and the penalty by the profit of the offence.

This form of satisfaction does not rest on so sound a basis when there is a money loss on one side, but no pecuniary profit on the other, as in cases of waste or destruction due to ill-blood, negligence, or accident.

It is still less appropriate when we cannot put a money value either on the wrong suffered by the party injured or on the advantage secured by the aggressor, as in the case of wrongs which hurt a man's honour.

The more an expedient for compensation is found to be incommensurable with the damage sustained—the more an expedient for punishment is found incommensurable with the advantage secured by the offence—the more likely are both expedients to fail of their end.

The old Roman law, "which awarded a crown as redress for a blow, afforded no security to honour; and, as the

reparation had no common measure with the outrage, its effect was quite uncertain either as a mode of compensation or as a punishment.

There still exists in England a law which is a veritable relic of barbarous times: *Manent vestigia ruris*. A daughter is deemed to be the servant of her father; and, in the event of her seduction, the father can secure no satisfaction other than a sum of money, the price of domestic services supposed to have been lost to the father during the period of pregnancy.<sup>1</sup>

So far as personal injuries are concerned, a money indemnity may or may not be proper: it will depend on the respective fortunes of the parties interested.

In regulating pecuniary compensation, we must not forget the two branches—the *past* and the *future*. Satisfaction for the future simply consists in putting an end to the evil of the offence: satisfaction for the past in compensating the wrong already undergone. Payment of an amount due is satisfaction for the future; payment of arrears of interest accrued due on that amount is satisfaction for the past. Interest ought to run from the moment when the particular mischief was occasioned; from the moment, for example, when a delayed payment should have been made, or when the article in question was, carried off, damaged, or destroyed, or when the service to which one was entitled was neglected.<sup>2</sup>

Interest, awarded as a form of compensation, should be computed on a scale higher than that current in ordinary commerce—at any rate, when there is any suspicion of bad

<sup>1</sup> In former times some proof of actual service was necessary in all cases; but later, where an unmarried girl, under age, lived with her father, and was not in the service of anyone else, service to her father has been presumed. There must be service both at time of the seduction and at the time of the accrual of the damage (*cf. Hamilton v. Long* [1903], Ir. R., 2 K.B., 407). (C. M. A.)

<sup>2</sup> The statute 3 and 4 Wm. IV., c. 42, empowers a jury (s. 29) to give 'damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass *de bonis asportatis*.' (C. M. A.)

Payment  
of interest  
—could.

faith. This excess is very necessary; for, if the interest were at the current rate, there would be cases in which the compensation would be inadequate, and other cases in which a profit would result to the offender—a pecuniary profit, if his object were to obtain a forced loan at the ordinary rate of interest; a pleasure based on the gratification of hatred or revenge, if he wished to keep the injured party in a state of want and to rejoice in his distress.

For the like reason, compound interest should be allowed; that is to say, whenever, according to customary usage, any payment of simple interest would fall due, the amount of such interest should be added to the principal sum. This is so, because on each occasion that simple interest became payable, the capitalist might have converted it into capital or derived some equivalent advantage from it.

If this factor in the damage were left uncompensated, there would result a loss to the injured man and a gain to the offender.

Joint offenders.

So far as joint offenders are concerned, the burthen of compensation ought to be shared in the ratio of the amounts of their respective fortunes; save in so far as varying degrees of criminality might call for any modification in the scheme of distribution. In fact, the obligation to compensate is a penalty, and this penalty would be grossly unequal if joint offenders of unequal wealth were mulct in identical sums.<sup>1</sup>

<sup>1</sup> Unless by virtue of express statute (as in the case of co-directors issuing a fraudulent prospectus), no right of contribution between joint-feasors arises where one wrong-doer has paid the whole of the damages: not even, as it would seem, in those cases where there was no intention to do anything unlawful. The rule carried to this length 'does not appear to be founded on any principle of justice, or equity, or even of public policy' (see *per* Lord Herschell in *Palmer v. Wick and Pulteney Town Steam Shipping Co.* [1894], A. C., at p. 324). (C. M. A.)

## CHAPTER XXVI.

### OF RESTITUTION IN KIND.

RESTITUTION in kind is mainly applicable in cases relating to property which possesses a value of affection: such as real estate generally, family portraits and relics, the handiwork of a dear friend, domestic animals, antiquities, curiosities, pictures, manuscripts, musical instruments; in fact, everything which is, or appears to be, unique. Restitution in kind as a form of redress.

But restitution in kind would be proper in every case, if, indeed, it were possible; for the law ought to assure me everything which is mine, without forcing me to accept equivalents—and they are not even equivalents if they are not to my taste. In the absence of such restitution, security is not complete; how can the whole be secure if its part is not secure?

An article, carried off either in good or in bad faith, may have passed into the hands of a holder who, in all good faith, claims to possess it. Should it be restored to the original owner, or retained by its present possessor? The rule is simple enough: it should remain with him who may be presumed to have the greatest affection for it. And this presumption, as to where the superior degree of affection lies, will be readily raised from the relation that has been borne to the article in question, the time that it has been in possession, the services that have been derived from it, the care and cost that have been bestowed upon it. Such indications commonly conspire to support the claim of the original owner.<sup>1</sup> Restitution as between two innocent claimants.

<sup>1</sup> If we are concerned with a thing or an animal which is capable of reproduction, we may determine, in the same way, on which side will lie the superior degree of affection for its products or offspring; as, e.g.,

Claims of  
original  
owner.

Moreover, the preference is also due to the original owner in cases where there is any doubt, and this for four reasons :

(a) The present possessor may have been an accomplice in a fraudulent acquisition, although we may not be in a position to obtain proofs of his complicity. Nor is he wronged by this suspicion; for, being the creation of the law and not of man, bearing on a class and not upon any individual member of it, such suspicion is no impeachment of his honour.

(β) Although not an accomplice, the present possessor may have been guilty of negligence or rashness, either in omitting ordinary precautions to assure himself of the vendor's title, or in accepting too readily insufficient proofs of ownership.

(γ) If the question arises in connection with a grave crime, such as robbery, preference should be given to the first possessor, so as to strengthen the motives which induce a man to undertake a prosecution.

(δ) If the spoliation has sprung from malice, to leave the article in the possession of anyone except the despoiled proprietor would be to concede to the delinquent the whole advantage he hoped to reap from his crime.

Purchases  
at low  
prices.

A purchase at a very low figure should always be followed by restitution, on repayment of the price actually paid. This circumstance, even if it does not prove complicity, at least raises a strong presumption of bad faith. The purchaser could not fail to be aware of the probability that his vendor had been guilty of dishonesty; for it is the risk incurred in conveying stolen goods to an open market that causes them to fetch a low price.

When, owing to the bad faith of his vendor, an innocent possessor is required to restore an article to its original

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the wine from a particular vineyard, the foal of a favourite horse, etc. It may well be, however, that, in such cases, the claims of the original owner will not be so certain to prevail. The last holder is only the second proprietor of the thing or animal that produces, but he is first proprietor of the product or offspring (Dumont).

owner, it ought to be on condition that he received some pecuniary compensation to be determined by the magistrate.<sup>1</sup>

The actual cost of preservation and maintenance—and, *a fortiori*, charges for improvements and extraordinary expenses—ought to be assessed in a liberal spirit and allowed to the man last in possession. This not only tends to a general increase in wealth, it is even in the interest of the original owner, although the indemnity may come out of his pocket. According as this indemnity is granted or denied, improvement of the article is encouraged or prevented.<sup>2</sup>

Com-  
pensation for  
improvements, etc.

Neither the original owner nor the last possessor ought to make a profit at the expense of the other. The one who suffers loss ought to have recourse for an indemnity, in the first instance, against the offender, and in default against the subsidiary fund of which we shall speak presently.<sup>3</sup>

<sup>1</sup> Cf. s. 30 of the Pawnbrokers Act, 1872, (35 and 36 Vict., c. 93.) (C. M. A.)

<sup>2</sup> It matters not whether the last possessor acts in good faith or dishonestly. It is not for his sake, but for the sake of you, the true owner, that it ought to be made to his interest to bestow care on the estate or article that has come into his possession. Nothing is more advisable than that he should derive profit from any improvement he may effect. It would, of course, be possible to impose a penalty in respect of any omission causing depreciation; but the best way of keeping the property intact is to offer a reward, or rather an indemnity, in respect of care bestowed on its preservation. There are many cases in which it would be difficult to establish negligence; and, besides, when reward finds its proper place, and does not involve danger, reward and punishment together are worth more than punishment standing alone (Dumont).

<sup>3</sup> I lose a horse worth thirty pounds; you buy it from a man, who sells it as his own, for ten pounds. By virtue of the above rule, you must hand it over to me on receiving from me what you gave for it. I am the loser; and it remains for me to recover from your vendor my ten pounds, and, in default, I ought to have a claim on the public exchequer. But if, instead of adjudging the horse to me, it had been awarded to you (which might be reasonable enough in some circumstances), you should be required to pay me the full value; otherwise I should be made to suffer a loss that you might secure a gain. But in that case you should have recourse to the property of the offender, and in default to the public exchequer (Dumont).

Rare articles: articles with sentimental value.

When it is impossible to restore the identical article, we should, so far as possible, insist on restitution taking the form of delivery of a similar article. Suppose, for example, two rare medals cast from the same die: the owner of one takes forcible possession of the other, and then loses or damages it, either through negligence or by design. In that case, the best form of satisfaction is to hand over the medal that remains intact to the injured party.

In offences of this kind pecuniary compensation is apt to prove inadequate, or even useless. A value of affection is rarely appreciated by third persons: it requires highly enlightened benevolence, a philosophy quite out of the common, to sympathize with tastes that we do not share. The Dutch florist, who exchanges a tulip bulb for its weight in gold, scoffs at the antiquary who gives a great price for a rusty lamp.<sup>1</sup>

Legislators and Judges have too often reasoned like the common herd: they have applied rough-and-ready rules to what demanded nice discernment. In certain cases, the offer of an indemnity in cash does not constitute redress: it is an insult. Would gold be accepted as the price of a treasured portrait of one's mistress that some rival had carried off?

<sup>1</sup> Some years ago a canary bird gave rise to a lawsuit before one of the French Parliaments. A journalist who reported the proceedings made great fun at the expense of the parties, and looked upon the whole case as very absurd. I cannot share his view. Is it not imagination that invests with their value the objects we deem most precious? Seeing that the laws are specially designed to harmonize with the general feelings of mankind, can they display too much concern for the safeguarding of everything which tends to promote the happiness of men? Ought they to ignore the sensibility that draws us towards creatures we have reared and tamed and taught, whose affections are entirely centred on us? This lawsuit, so ridiculous in the journalist's eyes, was in truth but too serious, for one of the parties had sacrificed to it, not his money only, but his honour and reputation. Can an object valued at such a price be esteemed a trifle? (Dumont). The word Parliament does not, of course, express in France, as it does in England, the Assembly of the Estates of the Realm. The French 'Parlements' were merely Courts of Justice. (C. M. A.)

Mere restitution in kind leaves a deficiency in compensation measured by the value of the enjoyment lost during the pendency of the offence. How is this value to be apprized? An illustration will make the matter clear. Suppose there is a statue which, put up at auction, would, in the opinion of experts, fetch a hundred pounds. This statue is unlawfully carried off; and between its removal and subsequent restitution there is the lapse of a year. Interest is at five per cent.: place under the head of compensation for the past, ordinary interest, five pounds; add for penal interest (*cf.* Chapter XXV., at p. 73), say, two pounds ten shillings; total, seven pounds ten shillings.

Deterioration, etc., of article whilst out of owner's possession.

And, in assessing the damages, we must not neglect the deterioration, whether accidental or unavoidable, which the article may have undergone in the interval between the commission of the offence and the restitution. The statue will not have undergone any appreciable deterioration—at any rate, not necessarily so. But a horse of the like price would inevitably have diminished in value. A collection of tables showing the natural deterioration, year by year, of divers articles, varying, of course, with their class and character, is one of the essentials of a legal library.

## CHAPTER XXVII.

### OF ATTESTATIVE SATISFACTION.

Satisfaction by  
attestation  
in cases of  
falsehood.

THIS expedient for the provision of compensation is peculiarly adapted to a crime of falsehood, where it is probable that there will result some belief prejudicial to a particular individual. We refer to cases in which it is not possible to demonstrate either the gravity or the extent of the consequences of the offence, or even to show that any such exist. But, while the error persists, it remains a constant source of present or probable mischief; and there is but one way of putting an end to it—that is, to gainsay it by putting in evidence the actual facts.

An enumeration of the principal crimes of falsehood will naturally find a place here:

False re-  
ports, etc.

(a) *Simple Mental Injuries, consisting in the Spreading of False Alarms.*—For example, stories of apparitions, ghosts, vampires, sorcery, diabolical possession, false reports calculated to inspire some person with fear or grief, such as pretended deaths, alleged misconduct on the part of a near relative, stories of conjugal infidelity or of loss of property; or take lies likely to strike terror in the minds of a class more or less numerous, such as rumours of pestilence, invasion, conspiracy, conflagrations, and the like.

Attacks on  
the reputa-  
tion.

(β) *Offences against the Reputation*, of which there are many distinct species: defamation of the positive kind, by means of deliberate allegations or damaging libels; negative attacks on the reputation, impairing where it is impossible to destroy, as by concealing from the public a circumstance which would have added to the *lustre* of

a famous action; 'interception' of reputation, as by suppressing an achievement calculated to redound to the honour of a particular individual, or by depriving a man of the opportunity of distinguishing himself by representing some enterprise contemplated by him as impossible or as already accomplished; and 'usurpation' of reputation, of which all plagiarism, whether of the work of authors or of artists, affords an illustration.

(γ) *Fraudulent Acquisition*.—Examples: false reports circulated for stock-jobbing purposes, or to influence the price of transferable shares in a trading company.

Falsehoods with a view to fraudulent acquisition.

(δ) *Disturbance in the Enjoyment of Rights incidental to some Civil or Domestic Status*.—Examples: denying a person, justly entitled thereto, the status of husband in relation to a particular woman; of wife in relation to a particular man; of son in relation to a particular man or particular woman—falsely assuming to oneself some such status—committing a similar fraud in relation to any other civil condition or privilege.

Frauds as to status or condition.

(ε) *Hindering Acquisition*.—That is, preventing a man from buying or selling an article by false reports as to its value or as to the right of disposal; or, it may be, preventing a man from acquiring a certain condition, say marriage, by false reports, which lead to its being put off or not taking place at all.

Falsehoods to prevent acquisition.

In all these cases the strong arm of the law would be powerless, while forcible methods would prove vain or imperfect. The only effective remedy is an authoritative declaration which destroys the falsehood. To abolish error, to make truth public—an honourable function, worthy of the highest tribunals!

Forms of attestative satisfaction.

What form should the attestative satisfaction assume? It may be as varied as are the methods of publicity: printing and publication of the decree at the charges of the offender, placards distributed at the pleasure of the party injured, announcements in the newspapers at home and abroad.

The notion of this type of satisfaction, so simple and so useful, is drawn from the jurisprudence of France. When a man had been defamed, the Courts, or Parliaments, as they were called, almost invariably ordered that the sentence which re-established his reputation should be printed and placarded at the expense of the libeller.

Adjudication generally better than retraction

But why thus force the offender to avow that he had uttered a falsehood; why force him to acknowledge in public the probity of the injured party? This procedure was vicious in several respects: it was wrong to require a man to give expression to sentiments which he probably did not, in fact, entertain; to risk the granting of a judicial injunction that might ordain a lie. It was wrong, again, to impair the reparation by employing an act of constraint; for what is proved by a retraction, if made under compulsion of law, unless, indeed, it be weakness and alarm on the part of the man who pronounces it?

The offender may, however, become the instrument of his own condemnation, if it is thought fit to add to his punishment in this way; and this may be compassed without deviating from the exact truth, provided that the prescribed formula comprises the sentiments of Justice, as being those of Justice and not those of the offender. 'The Court has adjudged that I have uttered a falsehood; the Court has decided that I have not acted the part of an honest man; the Court is of opinion that my opponent in this matter has behaved like a man of honour.' So far as the public and the injured party are concerned, this is all that is wanted. It is a victory for truth sufficiently signal, a humiliation for the culprit sufficiently galling. What would be gained by forcing him to say: 'I have uttered a falsehood; I have not acted the part of an honest man; my opponent has behaved like a man of honour'? This declaration, stronger than the first in appearance, is in reality less so. The fear which prompts such avowals does not alter the actual sentiments; and

when, before a large audience, they are uttered by the lips, we seem, so to speak, to hear a cry from the heart retracting every word.

If the avowal relates to a question of bare fact, Justice <sup>Avowal of error.</sup> is less likely to be duped, and the explicit admission of falsehood exacted from the defendant in his own name will almost always be in accord with his real feelings; but when it concerns an opinion—namely, the opinion of the offender himself—any retraction that is forced from him will almost always be at variance with his inner convictions. In such conflicts, impartial folk will condemn a man ten times for once that he will condemn himself. Even if he can for a moment become calm enough to indulge in reflection, he sees the triumph of his enemy before his very eyes, he is himself the instrument to proclaim it, and the goading of wounded pride will serve to stimulate the prepossessions of his mind. He may have been honestly deceived, and you compel him to brand himself a liar; you place him in a cruel position, and the honester he is the more will he suffer—he will be punished the more the less he deserves it.

No doubt many rascals, by means of a judicial decree too wide in its terms, have got themselves pronounced men of honour and probity; and that by the very persons who were best acquainted with their true character. But, what is the real significance of such a general declaration? Because a particular imputation is unfounded, does it follow that the man is wholly without reproach? Because he has been falsely charged on one occasion, does it follow that he has never committed crime? Yet we must mark this inconvenience attendant on an exculpation too general in form. Once let such a patent of honour be granted to a man of ill repute, and there arises direct conflict between public opinion and the ruling of the courts: their authority is impaired, and recourse will no longer be had to them for a remedy which, through bad administration, has lost its efficacy.

Under-  
takings as  
to future  
conduct.

With regard to promises, less reserve is necessary. It is enough to take care that the undertaking shall contain nothing contrary to the laws of honour and probity. A man ought not, for example, to be required to promise service against his country or his party; but he may be required to engage not to fight at all, because such an undertaking by him involves no loss to his country or to his party. He would not have been in a position to afford any service to either if, instead of being released on parole, he had been put to death or kept in irons.

## CHAPTER XXVIII.

### OF HONORARY SATISFACTION: DUELLING.

WE have just displayed the appropriate remedies for such offences against the reputation as have *falsehood* for their instrument. But there are others more dangerous still; *enmity* has even surer means of dealing a deadly blow at honour. Enmity does not always skulk behind malicious calumny: it may attack the foe in the open, and yet take care to avoid such violent methods as might involve any personal risk. The end in view is to humiliate. A course of action, the least distressing in its immediate effects, may often prove the most serious in its consequences. The infliction of some greater injury to the man's person might, perhaps, do less hurt to his honour; for we may well make him an object of scorn without arousing in his favour the feeling of pity, which would accompany the infliction of such serious personal injury, as would excite a feeling of antipathy against his assailant. In this class of offences, hatred has exhausted all her refinements: her schemes must be met by special remedies, which we propose to distinguish by the name of Honorary Satisfaction.

To appreciate the necessity for such special remedies, we must probe the nature and tendency of these offences, examine the causes of their gravity, and consider the remedy which has hitherto been afforded by the practice of duelling, noting in passing the inadequacy of that remedy. These inquiries, which touch the most delicate chords of the human heart, have been almost wholly neglected by our law-makers, and yet must form the very

Attacks on  
the reputa-  
tion based  
on enmity.

Necessity  
for special  
remedies.

groundwork of all good legislation in this matter of honour.

**Examina-  
tion of  
these  
offences.  
Loss of  
honour.**

In the present condition of the most highly civilized nations, the natural and common effect of these offences is to rob the injured person of a portion, more or less considerable, of his honour; that is to say, he no longer enjoys the same esteem among his fellows; he has lost a corresponding portion of such pleasures, services, and good offices of every kind, as are the fruits of that esteem; and he finds himself exposed to the vexatious consequences of the contempt of those around him. Now, inasmuch as this change, which has been wrought in the sentiments of mankind in general, constitutes the very essence of the evil, it is they whom we ought to regard as immediate authors of the mischief. The nominal offender inflicts only a slight cut which, left to itself, would quickly heal: it is other folk who, by the poisons they pour into it, create a dangerous, and often incurable, wound.

**Apparent  
harshness  
of public  
opinion.**

At the first blush, the harshness of public opinion towards a man who has suffered insult strikes one as a revolting piece of injustice. We will suppose that some stronger or more daring fellow abuses his superiority, and ill-treats in some way a man whose weakness alone should have sufficed to protect him. The whole world, with almost mechanical unanimity, instead of being roused to anger against the oppressor, range themselves on his side, and fall, like cowards, on his victim, with a scorn and sarcasm often more bitter than death itself. At this signal given by an unknown man, the public vie with each other in rushing upon their innocent prey, like some ferocious dog which only awaits a movement of his master's hand before seizing a passer-by. In this way, any scoundrel, who is minded to deliver an honest man to the torments of disgrace, can, in order to carry out his unjust and tyrannical work, make use of those who are called men of the world, men of honour. And, as the contempt which attends an insult

is proportioned to the insult itself, this tyranny on the part of the baser sort of men becomes the more difficult to repel the more outrageously its exercise is abused.

Whether the outrageous insult is deserved or not, no one condescends to inquire. Anyhow, it is a triumph, not only for its insolent author, but for everyone who can manage to add to its opprobrium. It is accounted an honour to trample on the fallen; the affront he has received separates him from his equals, and renders him unclean in their eyes, as by some social excommunication. So that the real evil, the disgrace which overshadows him, is much more the work of other men than of the original offender. He only points out the prey, it is they who seize and rend it: he ordains the punishment, they are the executioners.

Suppose, for example, that a man is carried away with anger to the point of publicly spitting in another man's face. Now, what is the actual mischief here? A drop of water, forgotten as soon as it is wiped away. But this drop of water may be converted into a corrosive poison that will vex the man throughout life. What works the transmutation? Public opinion, the opinion which allocates, at will, honour and shame. His cruel assailant knew well enough that the affront would serve as the forerunner and signal for an outpouring of contempt.

Any vile and brutal creature may, then, at his pleasure dishonour a man of virtue! With sorrow and chagrin, he may overshadow the close of the most distinguished career! But how can he possibly retain such fatal power? He retains it because irresistible corruption has conquered the first and purest of all tribunals—that which exerts the popular sanction. As a result of this deplorable perversion, the honour of every citizen is at the mercy of the worst of men: collectively, the citizens are under his command to execute decrees of proscription directed against any one of them individually.

Further  
indictment  
of Public  
Opinion.

Indictment  
only partially true.

Such is the indictment that might be preferred against public opinion; and the charges would certainly not be without solid foundation. Men, who worship brute force, are often guilty of injustice towards the weak and unprotected; but, when we come to probe the consequences of this class of offence, it will be plain that such crimes produce an evil quite apart from opinion, while the attitude of the public towards affronts and insults is not, in general, so improper and unreasonable as it might at first appear. I say 'in general' because there are many cases in which public opinion cannot possibly be justified.

Condition  
of affairs if  
there were  
no remedies  
for petty  
insults.  
Corporal  
Insults.

In order to grasp the full force of the mischief that may result from these outrages, we will put aside all question of applicable remedies; and, indeed, we must assume that none such exist. On this assumption the offences may, of course, be repeated at pleasure; a boundless career is open to insolence; the person insulted to-day may be insulted again to-morrow, the next day, on any day and at any hour. Each fresh affront paves the way for further insult, and renders more probable a succession of similar outrages. Now, the notion of 'corporal insult' comprises every act offensive to the person, which can be inflicted without causing serious physical mischief—everything which produces a sensation of unpleasantness, sorrow, or disquiet. But an act of this kind, which if it stood alone would be felt hardly at all, may, by mere force of repetition, cause a very painful degree of discomfort, or even unbearable anguish. I have read somewhere that water, falling drop by drop from a certain height on the shaven crown of a bare head, was one of the most cruel tortures ever devised: *Gutta cavat lapidem*<sup>1</sup> runs the Latin proverb.<sup>2</sup>

<sup>1</sup> *Gutta cavat lapidem non vi, sed sæpe cadendo.* Cf. Ovid, *Ex Ponto*, lib. iv. (x.), 5: *Gutta cavat lapidem, consumitur anulus usu.* (C. M. A.)

<sup>2</sup> To form an idea of the torment resulting from the persistent accumulation of trifling vexations, almost imperceptible when taken separately, we need only recall the effects of prolonged tickling, and the persecutions so common in the games and quarrels of childhood. At that period the slightest dispute ends in blows, the idea of decorum

Thus the person, compelled by relative feebleness to undergo vexations of this sort at the pleasure of his tormentor, and deprived, in accordance with our assumption, of any legal protection, would be reduced to a state of unspeakable misery. Nothing more would be needed to establish absolute despotism on the one side, abject slavery on the other.

Note, also, that the sufferer is not a slave of one man only, but of everyone who is minded to enchain him. He is the butt of the first comer, who, knowing his frailty, will be tempted to abuse it. He may be likened to a Spartan helot, under the heel of everybody, always in fear and always in pain, the object of general ridicule and of a contempt which is not even tempered by compassion; he is, in a word, lower than any slave, because the misery of the slave springs from a state of coercion that awakens pity, while this man's abasement owes its origin to the meanness of his condition.

There is, too, a further reason why these small vexations, these insults, have, in the matter of cruelty, a sort of pre-eminence over violent measures. Fierce outbursts of anger, which, indeed, often serve to extinguish in a moment the enmity of the aggressor, or even to excite a sudden feeling of regret, present to one's view a limit or end of suffering; but a humiliating and malicious insult, far from exhausting the hatred which prompted it, seems rather to incite to fresh annoyance, and it is thus pictured in the mind as the herald of a host of insults, the more alarming from being vague and indefinite.

What I have said of corporal insults may be applied to threats, since it is largely through their operation as acts of intimidation that such insults acquire their gravity.

*Insulting  
Threats.*

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not being of sufficient force to repress them; but the levity and pity natural to the very young prevent them from pushing matters to a dangerous point; while reflection has not imparted to them the feeling of bitterness which the mingling of accessory ideas arouses in later years (Dumont).

**Verbal  
Insults.**

Verbal outrages have not altogether the same characteristics. They constitute nothing more than a sort of vague defamation, an employment of injurious expressions of indeterminate meaning, which vary greatly according to the condition of the persons concerned.<sup>1</sup> Such insults indicate to the party attacked that he is alleged to be worthy of public contempt, without specifying any particular ground. The evil which may reasonably be expected to result is a repetition of revilings of the same type; and they may, too, well cause apprehension, lest so public a profession of contempt should serve as an invitation to others to join in the attack. For, in truth, this is an invitation to which men will readily respond: the pleasurable feeling of pride in administering reproof—raising oneself, as it were, at the expense of somebody else—the force of imitation, and the tendency to accept strong assertions—all conspire to increase the gravity of insults of this class. But they would seem to owe their chief importance to the neglect with which they have been treated by the law, and to the practice of duelling—that subsidiary remedy whereby the popular sanction has sought to supply the omissions of the law.<sup>2</sup>

**Duelling.**

It is not surprising that legislators, fearing to attach too much importance to trifles, have almost entirely neglected the branch of security concerned with petty acts of vexation. Physical mischief, which is naturally

<sup>1</sup> To call a man a rogue is not to lay any particular offence at his door, but to accuse him, in general terms, of such conduct as commonly leads to the gallows. We should carefully distinguish such insulting expressions from specific defamation, which relates to some particular matter and is susceptible of refutation in the form of attestative satisfaction. Insulting words of a vague and indefinite character cannot be grappled with in the same way (Dumont).

<sup>2</sup> 'There is scarcely a distinguished politician of the times of George III. who did not put his patriotism, his honour, or his truth, to the test of the pistol. Lord Talbot and Wilkes, Lord Shelburne and Colonel Fullarton, Lord Lauderdale and General Arnold, Townshend, Pitt, Fox, Sheridan, Wyndham, Canning, Tierney, Burdett, Brougham, Castlereagh, and the Duke of Wellington, are amongst the public men who have not refused the sanction of their names and example to the practice,' etc. (*Edinburgh Review*, vol. lxxv., p. 443). (C. M. A.)

enough adopted as a measure of the importance of an offence, is nearly non-existent; while the more remote consequences have escaped the inexperienced eyes of our law-makers. The duel presented itself to fill the gap.

This is not the place to inquire into the origin of duelling, or to investigate the varieties and apparent absurdities of the practice.<sup>1</sup> It is enough that the usage exists, and, in fact, assumes the form of a remedy, serving to reduce the disorder which would otherwise result from the omissions of the law.

The practice, once established, has the following direct Consequences of the Duel, consequences :

*First*, it puts an end, in great measure, to the evil of the offence; that is to say, to the shame which follows the insult. The party aggrieved is no longer in the miserable condition in which he found himself when exposed to the affronts of an insolent fellow and to the contempt of all mankind. He is released from a state of constant fear. The stain on his honour is effaced; and, indeed, if the challenge followed immediately upon the affront, the stain will not have had time to make any lasting impression, for dishonour does not consist in receiving an insult, but in submitting to it.

The *second* effect of duelling is that it acts in the character of a punishment, and tends to check the recurrence of similar offences. Every fresh instance serves to promulgate the penal laws of honour, and to remind men that

<sup>1</sup> In the age of chivalry many circumstances conspired to establish the duel. Tournaments and single combats, suggested by the passion for military renown and designed as forms of amusement, led naturally to challenges of honour. The idea of a special Providence, derived from Christianity, resulted in the conception of this form of appeal to Divine Justice and in the reference of disputes to its decision. But long before the Christian era, duelling was established in Spain as a judicial expedient. Cf. Livy, book xxviii., § 21 (Dumont). Mellinger (*History of Duelling*, 1841) records the deaths of sixty-nine persons killed during the reign of George III.; eighteen trials took place, and ten men were convicted, two only being hanged. The other eight suffered short terms of imprisonment. The two men hanged were really convicted rather of foul fighting than of duelling. (C. M. A.)

they cannot indulge in offensive conduct without risking the consequences of private combat; that is to say, without incurring the risk of undergoing, according to the issue of the particular duel, varying degrees of afflictive punishment, or even the penalty of death. Thus, the brave man who, by way of supplying the omissions of the law, hazards his life to avenge an affront adds to the general security of the community, while struggling to sustain his own.

Defects  
of the Duel  
regarded as  
a Punish-  
ment.  
Inapplica-  
bility to  
many cases.

But, regarded as a *punishment*, the duel is conspicuously defective:

(a) It is not an expedient which can be employed by everyone. There are many classes who cannot possibly share in the protection it affords; such as women, children, old men, the sick, and those who, from lack of courage, cannot make up their minds to atone for dishonour by incurring so grave a risk. Besides, by an oddity in this code of honour worthy of its feudal origin, the upper classes have not allowed their inferiors to stand on the same footing with themselves in regard to the duel: a peasant, outraged by some truculent fellow of gentle birth, cannot secure this form of satisfaction. In such case the insult may, no doubt, have less serious consequences; but yet it remains an insult, and the evil is without remedy. The duel, considered as a punishment, is in all these particulars found to be *inefficacious*.

Punish-  
ment is  
mixed with  
Reward.

(β) Indeed, it is sometimes not any punishment at all; for public opinion attaches to it a reward which, in the eyes of many persons, may well seem to countervail the attendant dangers. This reward is the honour connected with the proof of courage—an honour which has often invested the duel with such attractions as could not be overcome by any opposing risks or inconveniences. There was a time when it was essential to the reputation of a well-bred man that he should have fought at least once. A flash of the eye, some alighting gesture, an act of preference, the mere suspicion of rivalry, was quite enough for

men who wanted nothing but a pretext, and esteemed themselves requited a thousandfold for the perils they had run, by securing the applause of both sexes, with whom, for different reasons, bravery is equally in favour. Considered in this aspect, the punishment, thus mingled with reward, no longer retains its true penal character, and so is once more found to be *inefficacious*.

(7) Again, the duel, regarded as a punishment, is defective by reason of excess; or, to use a fitting expression, which will be explained elsewhere, it is too *expensive* a penalty. True, the meeting often amounts to nothing at all; but it *may* result in loss of life. Between the two extremes of everything and nothing, the parties are exposed to all the intermediate degrees of injury—wounds, scars, mutilations, limbs lost or maimed. It is manifest that, if called upon to make choice of the form of satisfaction in such cases, we should give preference to some penalty less uncertain and less hazardous, one which would neither imperil life nor yet be altogether meaningless.

Punish-  
ment too  
expensive.

There is a further singularity in this form of penal justice which is peculiar to the duel: costly to the aggressor, it is no less so to the party wronged.<sup>1</sup> The injured person can only enforce the right of punishment by exposing himself to the like penalty—and, indeed, he is at a plain disadvantage, for the chances are naturally in favour of him who has the opportunity of choosing his man before incurring any risk. Hence this mode of punishment is at once *expensive* and *ill-conceived*.

(8) Another special inconvenience attending the arbitration of the duel is that it aggravates the original offence, whenever the man who is wronged fails to have recourse to this form of vengeance—unless, indeed, it is acknow-

Refusal to  
seek the  
remedy  
adds to the  
injury.

<sup>1</sup> In this respect the Japanese rises superior to the man of honour of modern Europe. The European, for the chance of slaying his foe, offers him a reciprocal and equal chance. The Japanese, for the chance of inducing an adversary to rip up his belly, begins by setting him the example (Dumont).

ledged that the expedient is, in the circumstances, impossible. Suppose the injured party declines to send a challenge, he thereby betrays two capital blemishes, lack of courage and lack of honour—lack of the virtue which protects society and without which it cannot subsist, and lack of sensibility to the love of reputation, one of the fundamental bases of morality. Under the laws of duelling, then, the injured party is placed in a worse position than if those laws had no existence; for, by refusing to avail himself of the dire remedy they afford, they become for him, as it were, a poison that rankles in his wound.

Risk involved by innocent champion who acts as substitute.

(e) If, in certain instances, the duel, in its character of a punishment, has not proved so ineffective as would have seemed likely, this can only have been because some quite innocent person has exposed himself to penal consequences, which (seeing that he was free from blame) must necessarily have been unmerited. Such a case arises when the individual actually affronted, by reason of some infirmity due to sex, age, or state of health, is not in a position to resort to this mode of defence. The helplessness of the individual leaves open no resource, unless chance provides some protector who has both the capacity and the will to undertake responsibility, and do the fighting in place of the person actually injured. It is thus that a husband, a lover, a brother, may take upon himself to avenge an insult offered to his wife, his mistress, or his sister: but if, in such case, the duel affords adequate protection, it can only be by compromising the safety of a third person, who finds himself burdened with a quarrel to which he is personally a stranger, and in relation to which he has, probably, never been in a position to exercise the slightest control.

Duelling is effective in effacing the stain on honour.

It is beyond all manner of dispute that, considered as a factor in penal jurisprudence, duelling is an absurd and outrageous expedient; but, absurd and outrageous as it is, there is no denying that it attains its principal end—

*it entirely effaces the stain that insult impresses on honour.*<sup>1</sup> Commonplace moralists, by condemning public opinion on this point, serve only to confirm my statement. Now, whether or not, in view of this result, the duel is defensible, we are not concerned to discuss; the actual result is undoubted, and it has its cause. What that cause may be it is essential for the legislator to try to ascertain; so interesting a phenomenon ought not to remain unexplained by him.

As we have already pointed out, the man who submits to an insult is looked upon as degraded, as exhibiting weakness and cowardice. Always exposed to affront and to lasting reproach. I can no longer stand on an equal footing with other men, nor pretend to the same degree of respect. But if, after the insult, I present myself before my adversary, and agree to risk my life against his in single combat, my conduct uplifts me, at once, from the depths of humiliation in which I was plunged. If I die, I am delivered alike from public contempt and the insolent tyranny of my enemy. If he falls, I am thereby set free, and the wrong-doer is punished. If he be merely wounded, it is a sufficient lesson for him, and for such as might have been tempted to follow his example.\* But even supposing that I am wounded myself, or that both of us escape injury, still the fight is not futile—it always produces its effect. My adversary realizes that he cannot renew his insults save at the peril of his life, that I am not an unresisting creature who may be outraged with impunity; and thus my courage affords me protection almost as complete as that which I should have received from the law, had it

How the  
duel oper-  
ates as a  
punish-  
ment.

<sup>1</sup> In later years Bentham's views on duelling were greatly modified. Writing to the Duke of Wellington, on March 22, 1829, the day after the Duke's duel with Lord Winchelsea, Bentham said: 'In former days I thought I saw some benefits from it (i.e., the practice of duelling) to mankind, and committed the mention of them to writing; and, if I misrecollect not, to the press. On further consideration, I have arrived at the persuasion that they amount to little, if anything; and that, at any rate, they are in a prodigious degree outweighed by the mischievous effects.' (C. M. A.)

visited such offences with capital or other afflictive punishment.

Moreover, if, when this mode of satisfaction is open to me, I submit patiently to the insult, I render myself an object of scorn in the eyes of the public; because my conduct reveals a pitiful lack of courage on my part, and cowardice is always accounted one of the most glaring defects in a man's character. A poltroon has ever been an object of contempt.

Cowardice  
rightly re-  
garded as  
contempt-  
ible.

But ought this lack of courage fairly to be ranked among the vices? Is the opinion, which reckons cowardice contemptible, a useful or a harmful prejudice?

It can hardly be doubted that this opinion accords with the public interest, when we reflect that, self-preservation being the first law of nature, courage must be more or less a factitious quality, a social virtue which owes its origin and growth to public approval rather than to any other assignable cause. Anger may kindle ardour for the moment; but courage, calm and long sustained, can only spring up and ripen under the happy influences of honour. The contempt, then, which is felt for cowardice is no foolish prejudice; nor is the suffering it entails on poltroons a punishment inflicted to no purpose. The very existence of the body politic depends on the courage of the individuals who compose it. The safety of a country, so far as rival States are concerned, rests on the bravery of its warriors: the internal security of the State, as against aggression on the part of these same warriors, depends upon the degree of courage diffused amongst the general body of private citizens. In a word, courage is the soul of the State; its tutelary genius; the sacred palladium that alone can safeguard the people against the miseries of servitude, uphold them in the state of manhood, and preserve them from falling below the level of the brute creation. Now, the greater the tribute of honour that is paid to courage, the greater will be the number of courageous men; the more

cowardice is despised, the fewer will be the number of cowards.

Nor is this all. The man, who, being in a condition to fight, pockets an affront, does not merely betray timidity; he also rebels against the popular sanction, which has placed the practice of duelling on the footing of a law, and shows himself, in an essential point, careless of his own good name. And this popular sanction is the most active and faithful minister of the Principle of Utility, the most powerful and least dangerous ally of the political sanction. For are not the laws of the popular sanction, as a general rule, in full accord with the laws of utility? The more alive a man is to the value of his good name, the more likely is it that his character will conform with the dictates of virtue; the less sensible he is of its value, the more readily will he become a prey to the seducing influences of vice.

Importance  
of being  
jealous of  
one's good  
name.

Now, what is the net result of this discussion? That, owing to the condition of neglect in which the law has been content hitherto to leave the honour of the citizens, he who submits to insult, without recourse to the form of satisfaction prescribed by public opinion, thereby shows himself reduced to a state of humiliating inferiority, and is exposed to the infliction of an endless series of affronts. He shows himself, too, devoid of the sentiment of courage which makes for the general safety; and, finally, he is displayed as a man bereft of regard for his own good name, a regard which serves to foster every virtue and to shield against every vice.<sup>1</sup>

General  
résumé of  
the posi-  
tion.

On examining the tendency of public opinion in relation to insults, it seems to me that, speaking generally, public

<sup>1</sup> When an old man, Bentham said to Bowring: 'Duelling should be prevented by legislation. The challenge is the inchoate offence, the battle the completed one. Duelling does a vast deal more mischief than people are aware of. It is the instrument of secret tyranny to a prodigious amount. . . . It may be *checked* now, but it can only be put down by the introduction of a natural system of procedure' (Bowring's edition of *Bentham*, vol. x., p. 66). (C. M. A.)

Duelling—  
contd.

opinion has been sound and useful; and that the successive changes it has effected in the practice of duelling have brought that practice more and more into conformity with the Principle of Utility. The general public would be in the wrong—or, rather, would be guilty of manifest folly—if, on the mere view of an affront, they forthwith issued a decree of infamy against the insulted party. But that is not what is done: the decree of infamy is issued only in case the party insulted rebels against the laws of honour, and signs under his own hand, so to speak, a decree of degradation from the status of manhood.

The public then is, speaking generally, in the right as to this system of honour.<sup>1</sup> The blame really lies at the door of the law: first, in allowing, so far as affronts are concerned, a state of anarchy to prevail, such as has compelled recourse to this fantastic and unfortunate expédient; secondly in having set itself in opposition to duelling, a remedy imperfect enough, it is true, but the only one available; and, thirdly, in having opposed it by methods altogether undue and inefficacious.

<sup>1</sup> Does the public grasp the true grounds on which its opinion can be justified? Is it guided by the Principle of Utility, or by mechanical imitation and a blind instinct? Does the duellist act on an enlightened view of his own and the general interest? These questions are more curious than useful; but there is an observation which may assist in resolving them. It is one thing to be guided by the existence of certain motives; it is another thing to perceive the drift and influence of those motives. There is no action or judgment without motive, no effect without a cause. But, to understand the influence that a motive exerts upon us, we must know how to turn the mind upon itself, to anatomize thought. We must needs divide the mind into two parts, one of which is engaged in observing the other—a difficult operation of which, from want of practice, few persons are capable (Dumont).

## CHAPTER XXIX.

### REMEDIES FOR OFFENCES AGAINST HONOUR.

WE begin by setting forth the various methods by which satisfaction may be afforded for offended honour. The grounds upon which the use of these methods may be justified will follow.

Offences against honour may be divided into three groups or classes: Verbal insults; corporal outrages; insulting threats. Expedients  
for satis-  
fying  
offended  
honour.

A penalty, which bears resemblance to the offence, should operate at the same time as a mode of affording satisfaction to the injured party.

*List of these Punishments.* — (1) Simple admonition. (2) Compelling the offender to read his own sentence in a loud voice. (3) Bringing the culprit to his knees before the person he has wronged. (4) Making humble apology in a form prescribed. (5) Emblematical garments (with which the culprit may in certain cases be clad). (6) Emblematical masks (an adder's head in cases of bad faith, the head of a magpie or parrot in cases of rash words or conduct). (7) Witnesses of the affront to be summoned to behold the act of reparation. (8) Persons, whose regard is highly valued by the culprit, to be summoned to the execution of the sentence. (9) Giving publicity to the judgment (by choice of place; number of spectators; publication in the press, or by means of placards, or by distributing copies of the sentence). (10) Banishment for a longer or shorter term (either from the presence of the party wronged or from that of his own friends).

For an insult offered in a public place—as, *e.g.*, a market, theatre, or church—banishment from such place. (11) For a corporal outrage, retaliation inflicted by the injured person, or, at his option, at the hands of the public executioner. (12) For insult offered to a woman, the culprit might be dressed up with the headgear of a woman, and retaliation inflicted by a woman's hand.

Many of these methods are novel, and some will seem very odd; but fresh expedients are certainly necessary, for experience has demonstrated the inadequacy of the old ones. And, as to their apparent singularity, that is the very circumstance which adapts them to their end, and fits them, by a sort of analogy, to transfer to the insolent wrong-doer the contempt he has sought to pour on his innocent victim.

Necessity  
for great  
variety of  
expedients.

These expedients are many and various in order that they may correspond with the number and variety of offences of this kind; in order that they may be adapted to the gravity of the particular case, and furnish reparation suited to the many different social distinctions; for it is not desirable to treat in the same way an insult offered to an underling and to a magistrate, to a churchman and to a soldier, to a youth and to an aged man. All this theatrical show, these speeches, these poses, these emblems, these ceremonies solemn or grotesque as occasion may require—in a word, these public forms of satisfaction, in the guise of spectacular display—furnish the injured party not only with present pleasure, but also with pleasures of memory, such as amply compensate him for the humiliation of insult.

The form of  
reparation  
should be  
analogous  
to the  
wrong.

It must be observed that, inasmuch as the wrong was wrought by artificial means, it is fitting that some artificial expedient should enter into the form of reparation; otherwise it will not strike the imagination in the same way, and will necessarily be incomplete. The wrong-doer having made use of a certain kind of injury for the purpose

of pouring public contempt upon his adversary, we must needs employ an analogous form of injury to throw back, as it were, that contempt upon himself. It is in public opinion that the seat of the mischief lies; it is in public opinion that we must find the remedy. The wound inflicted on Telephus by the spear of Achilles could be cured only by a touch of the same weapon.<sup>1</sup> That is a symbol of the working of Justice in matters of honour: it is by an affront that the mischief has been done; it is by humiliation that the wrong must be repaired.

Let us trace the effects of this kind of satisfaction. The man who has been wronged, humbled before his aggressor, is no longer secure in his old haunts, while the future holds out a prospect of renewed insults. But, when legal reparation has been made him, he at once regains what he has lost, walks in safety and with head erect, and even acquires an actual superiority over his adversary. How has this change been wrought? Why, in this way: we no longer see in him a weak and wretched creature, whom any man may trample underfoot; the strength of the magistracy has become his strength; no one will be tempted to repeat an insult which has been so signally avenged. His oppressor, who for the moment seemed so high and mighty, has fallen headlong from his triumphal car; his punishment, inflicted in the sight of a host of witnesses, shows clearly enough that he is no more to be feared than any other man: the only remaining vestige of his violence will be the memory of his chastisement. What could the injured party wish for more? Had he possessed the strength of a Samson, could he have done better?

If the legislator had always applied such a scheme of satisfaction in suitable fashion, we should never have seen the rise of duelling; for that practice has been, and still is,

Effects of  
legal reparation.

If legal reparation were provided, the duel would disappear.

<sup>1</sup> Telephus, son of Heracles and Auge, became King of Mysia. He was wounded by Achilles, and learnt from the oracle that his wound could only be cured by him who had inflicted it. Achilles effected the cure by means of the rust from the spear which he had used. (C. M. A.)

**The Duel—** a mere supplement in aid of an inadequate system of laws.  
**const.**

In proportion as this void in legislation is filled by means of adequate arrangements adapted to the protection of honour, we shall see the custom of duelling diminish; and, indeed, it would cease altogether if provision were made for honorary satisfaction in complete accord with public opinion, and for the faithful administration of the laws. In former times, duelling served as a mode of arbitrament in a large number of cases in which it would be the height of absurdity to employ it nowadays. A litigant, who should send his opponent a challenge in order to prove a title or establish a right, would be thought a fool; but in the twelfth century such an expedient would have been accounted quite reasonable and regular. Whence comes this change? Why, from the change which, by slow degrees, has taken place in jurisprudence? Justice, growing more and more enlightened, and adhering more and more closely to fixed laws and regular forms, has gradually afforded means of redress more acceptable than the duel.<sup>1</sup> The same cause will ever produce the same effects. So soon as the law provides a sure and certain remedy in the case of offences directed against honour, there will cease to be any temptation to resort to a dangerous and doubtful expedient. Are people in love with pain and death? Most certainly not. Such a sentiment is as foreign to the breast of the hero as to the heart of the coward. It is the silence of the law and omissions on the part of Justice which compel the prudent man to protect himself by recourse to this pitiful expedient, the only one available to him.

**Honorary Satisfaction must be wide enough to meet every form of insult.**

To give to honorary satisfaction the full scope and efficacy of which it is susceptible, our definition of offences directed against honour must be wide enough to embrace them all. Follow public opinion step by step; be its

<sup>1</sup> In 1305 Philippe-le-Bel abolished the duel in civil matters. He set up courts with regular sittings at Paris, and did much for the establishment of judicial order (Dumont). Cf. Voltaire's *Histoire du Parlement de Paris*, ch. 2. (C. M. A.)

humble and faithful interpreter. Everything that is commonly regarded as assailing honour, do you also so regard it. Given that, in the eyes of the public, a word, a look, a gesture, is enough to constitute an affront; such word, look, or gesture, ought to be enough to constitute an offence in the eye of the law. The mere intention to insult, in itself, amounts to an insult: everything addressed to a man to mark contempt for him, or to bring contempt upon him, is an affront, and ought to be followed by due reparation.

Satisfaction  
for Insults  
—*cond.*

It may be said that many of these seeming insults, uncertain or transient in their nature, and often, perhaps, bred of the imagination, would be difficult to define with the necessary precision; and that touchy persons, seeing an insult where none was intended, might subject quite harmless people to wholly unmerited punishment. But the risk is insignificant, because it is easy to draw the line of demarcation between real and imaginary insults. It will be enough, at the request of the complainant, to submit the defendant for cross-examination as to his intention: 'Did you purpose, by what you have said or done, to brand such an one with contempt?' If he says 'No!' the answer, true or false, suffices to clear the honour of the person who was, or believed himself to be, injured. For, even if the insult had been such as to leave little room for doubt as to the intention, to deny it is to have recourse to a lie, to admit a mistake, or to betray weakness and fear: in a word, it is to place oneself on a lower level than, and to humble oneself before, one's adversary.

In preparing a catalogue of offences which bear the character of insults, some very necessary exceptions must be made. Care must be taken lest the decree of proscription should include useful acts of public censure—acts done in the exertion of the popular sanction. To friends and those in authority must be reserved a right to correct and reprimand; while a certain liberty must be allowed to the writers of history and criticism.

## CHAPTER XXX.

### OF VINDICTIVE SATISFACTION.

On the  
Pleasure of  
Revenge.

THIS subject does not suggest the need of many special rules. Every species of satisfaction, importing as it does some punishment of the offender, naturally bestows, on the party injured, the pleasure of revenge.

Now, that pleasure is a gain. It calls to mind Samson's riddle: it is the sweetness that comes forth from the strong. it is as honey gathered in the lion's maw. Being produced without cost, and being the net profit clear of all charges after an operation necessary on other grounds, it is in the nature of an enjoyment, and therefore to be cultivated like any other enjoyment; for, considered in the abstract, the pleasure of vengeance is, as in the case of other pleasures, a good in itself.<sup>1</sup> Whilst confined within the limits of the law it is innocent enough; but it becomes criminal the moment those limits are overstepped.

Groundless  
Antipathy  
more dan-  
gerous than  
the passion  
of Revenge.

No, it is not revenge that we should regard as the most malign and dangerous passion of the human heart; it is antipathy, it is intolerance, the hatred that springs from pride, prejudice, religion, and politics. In a word, the really dangerous enmity is not such as is well founded, but such as arises without any lawful cause or justification.

<sup>1</sup> The foregoing passages are cited by Lecky, in the *History of European Morals*, as an illustration of his statement (third edition, vol. i., p. 41) that—'The feeling of revenge was for centuries the one bulwark against social anarchy, and is even now one of the chief restraints to crime.' Lecky also cites a passage from Mr. Justice Stephen's work, *On the Criminal Law of England*: 'The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.' (C. M. A.)

Useful to the individual, this motive of revenge is useful also to the general public; or, to speak more correctly, it is necessary. It is this vindictive satisfaction which loosens the tongue of the witness, and sets the accuser in motion, engaging him in the service of Justice despite the trouble, expense, and enmities involved in a prosecution. This, too, it is that outweighs pity and gives public sanction to the punishment of the culprit. Take away this moving force, and the wheels of the law will come to a standstill; or, at any rate, the tribunals will secure no assistance except such as is bought at a price—and the expedient of such a money payment is not only burdensome to the community, but is exposed to other very serious objections.

*The motive of Revenge is necessary to good Government.*

I am well aware that the common type of moralist, ever the dupe of words, cannot grasp this truth. The spirit of vengeance is hateful; any satisfaction drawn from such a source is vicious; forgiveness of injury is the most excellent of all virtues; and so on. No doubt, implacable characters, such as no satisfaction will assuage, are regarded as odious, and rightly so. To forget injuries is a virtue essential to humanity; but it is a virtue to be practised when Justice has done her work, and has either afforded or refused some form of satisfaction. To forget injuries before Justice has played her part is to invite the repetition of such injuries—to be the enemy, not the friend, of society.

What more could rascality desire than an arrangement whereby crime should be forthwith followed by forgiveness?

What, then, ought to be done with the object of affording vindictive satisfaction? We must do everything that is just and proper to meet the requirements of the other kinds of satisfaction, and to inflict punishment for the offence; but we must go no farther.

*The Limits of Vindictive Satisfaction.*

The smallest excess devoted solely to the object of vengeance would be an unmitigated evil. Impose the

appropriate penalty, and let the injured party derive from it such measure of enjoyment as his nature is susceptible of and as his situation warrants.

Without, however, making any addition to the severity of the punishment with this special object in view, we may introduce certain modifications in the character and circumstances of the penalty, in accordance with what may be supposed to be the feelings entertained by the injured party, whether from some peculiarity in his situation or from the nature of the offence. A few illustrations have been given in the preceding chapter,<sup>1</sup> and we shall come across others when dealing with the choice of punishments.

<sup>1</sup> *Cf. ante*, p. 99.

## CHAPTER XXXI.

### OF SUBSTITUTIVE SATISFACTION, OR SATISFACTION OF WHICH THE BURDEN FALLS ON A THIRD PARTY.

THE burden of satisfaction ought, in ordinary cases, to rest on the author of the mischief. Why? Because, when so resting on him, it tends, as a punishment, to prevent such mischief by diminishing the frequency of the crime. Falling upon another person, it would have no such effect.

On whom  
the Burden  
of Satisfaction  
should  
rest:

Suppose, however, that, in the special circumstances, this reasoning does not hold good as to the person primarily responsible; while, in the event of his default, it would prove applicable should the punishment be inflicted on some other person. The law of responsibility should, then, be modified accordingly; or, in other words, a third person ought to be called upon to pay instead of the author of the mischief, when the latter cannot find the money to make satisfaction, and the obligation to pay, if imposed on this third person, would tend to prevent such offences.

Now, this may happen in the following cases: Where the responsibility is that (I.) of a master for his servant; (II.) of a guardian for his ward; (III.) of a father for his children; (IV.) of a mother, in her character of guardian, for her children; (V.) of a husband for his wife; (VI.) of an innocent person who profits by the offence.

I. *Responsibility of a Master for his Servant.*—This responsibility rests on two grounds, 'security' and 'equality.' The obligation imposed on the master acts as a penalty, and diminishes the chance of like mishaps. It becomes his

Responsi-  
bility of  
Master  
rests on  
'Security'  
and

interest to acquaint himself with the character of those for whom he is answerable, and to keep a watch upon their conduct. The law makes him a sort of Police Inspector, or domestic Magistrate, by rendering him accountable for 'Equality.' their recklessness. Again, the status of master, almost of necessity, presupposes the possession of a certain amount of wealth; but the condition of being an injured party, the object of some misfortune, presupposes nothing of the sort. And, when an unavoidable evil has to be borne between two individuals, it is best to throw the weight of it upon the one most capable of supporting it.

**Balance of convenience in favour of Responsibility of Master.**

This responsibility may be attended by certain inconveniences; but, if it did not exist, the inconveniences would be greater. Suppose a master wished to commit waste on his neighbour's land; to expose his neighbour to personal danger; to wreak vengeance upon him; to make his life a source of constant disquiet. The man need only choose depraved servants, who might, by mere suggestion, be prompted to minister to his hatreds and passions—and this without giving them any orders, and without becoming their accomplice; or, at any rate, without any possibility of his complicity being brought to light. Always ready either to urge them on or to disavow their actions, he might make them the instruments of his projects and run no risk himself.<sup>1</sup> By displaying more than ordinary confidence in them, by taking advantage of their attachment, their devotion, their servile vanity, there is nothing he could not obtain from them by instigation couched in general terms, without exposing himself to risk by indicating something in particular. And thus would he rejoice, with impunity, in the mischief he had wrought by their hands. 'Unhappy that I am!' cried Henry II.

<sup>1</sup> There are many ways of using another man to work mischief without leaving any trace of complicity. I have been told by a French lawyer that, when the parliaments wished to save a culprit, they designedly chose some unskilful person to report the case, hoping that his unskilfulness would give rise to opportunities for annulling the proceedings. Such a mode of procuring miscarriage really displayed genius (Dumont).

one day, wearied by the arrogance of an insolent prelate : ' What ! so many servants who boast of their zeal, and not a man of them minded to avenge me ? ' <sup>1</sup> The result of this rash and criminal apostrophe was the murder of Archbishop à Becket.

But, so far as the master is concerned, the risks attendant upon his responsibility should be, in great measure, curtailed by the responsibility of the servant. The real author of the mischief ought, if circumstances permit, to be the first to suffer its ill consequences ; he ought to be charged, according to his means and capacity, with the burden of making satisfaction, so that a reckless or evil-minded servant may not, while causing the damage, be able coolly to say : ' It is my master's affair, not mine. ' <sup>2</sup>

Moreover, the responsibility of the master is not always the same : it must vary with many circumstances that should be carefully examined.

The first thing to be considered is the nature and extent of the connection between the master and his servant. Are we concerned with a day labourer or a man engaged by the year ? with an outside worker or one who lodges in the master's house ? with an apprentice or a slave ? It is clear that the closer the connection, the greater should be the degree of responsibility ; a steward is less dependent on his employer than a lackey on his master.

The second thing to be considered is the character of the work on which the servant is employed. The presumptions against a master are weaker when the nature of the work is such that his own interests are likely to suffer from any

<sup>1</sup> The phrase usually put into the mouth of Henry is : ' Of the cowards who eat my bread, is there not one who will free me from this turbulent priest ? ' (C. M. A.)

<sup>2</sup> Under the Factory and Workshop Acts, the servant actually committing an offence for which his employer is liable may, in certain circumstances, be fined, and the employer may exempt himself on conviction of the actual offender (1 Edw. VII., c. 22, ss. 140, 141). There are many other statutes containing similar provisions, as, e.g., the Bread Act, 1836, the Employment of Children Act, 1903, the Margarine Act, 1887, and the Shops Act, 1912. (C. M. A.)

Servant should remain primarily responsible.

Degree of Master's Responsibility.

defaults on the part of his agents. The master has already a sufficient motive to exercise care in supervision; but, where he is himself not so likely to suffer, the motive is not so strong, and the law should supplement it.

Thirdly, the master is peculiarly responsible in cases where the mishap has occurred in the course of employment or during the hours of service. It is, then, to be presumed that the master may have given directions in the matter; or, at any rate, should have foreseen the probability of such an occurrence. Moreover, it is easier for the master to exercise supervision over his servants during their hours of service than during their intervals of leisure.

Case of  
serious  
crime.

There is one case in which the strongest reason for fixing the master with responsibility is much diminished, if, indeed, it be not altogether destroyed. That is, when the mischief originates in some serious crime, which is attended by adequate punishment; as where my man, having some personal quarrel with my neighbour, is minded to fire his barn. Ought I, in such case, to be answerable for damage I could not prevent? If the reckless rogue has no fear of the halter, would dismissal from my service cause him much alarm?<sup>1</sup>

Presump-  
tions on  
which Mas-  
ter's Re-  
sponsi-  
bility rests  
may be  
rebutted.

Such are the presumptions which serve as the groundwork of responsibility: presumption of negligence on the part of the master, presumption that his wealth is greater than that of the injured party, etc. But it must not be forgotten that these presumptions amount to nothing when they are rebutted by the actual facts. As an illustration, suppose that an accident has happened by the overturning of a waggon. Nothing is known of the person injured; but it is presumed that he will receive compensation from the owner, who presents himself to one's mind as being more likely than the injured man to be in a position to bear the loss. But what becomes of this presumption when it is known that the owner is a poor farmer,

<sup>1</sup> By 9 Geo. I., c. 22, setting fire to any house, barn, etc., was made felony *without benefit of clergy*. (C. M. A.)

while the injured man is a wealthy noble; that the one would be ruined if he had to provide an indemnity which is of little or no importance to the other? Presumptions should serve as guides, but not as dictators. When laying down general rules, a legislator should consult them; but he should leave the magistrate a discretion to modify their application according to the circumstances of the particular case.

The general rule will establish the responsibility of the master; but the magistrate should have power to modify this regulation according to circumstances, so as to throw the burden of loss on the real author of the mischief.

Rules as to Responsibility should not be inflexible.

From leaving to the magistrate the widest discretion in this matter, the greatest abuse that could possibly result would be the occasional introduction of the same inconvenience which a rigid general rule would of necessity introduce, howsoever it might be framed. For if the magistrate should favour the author of the mischief on one occasion, and the master on another, he who is wronged by the unfettered discretion of the magistrate will suffer no more than if he had been wronged by an inflexible rule of law applicable in every case alike. In our systems of jurisprudence, no attention has been paid to the need for flexibility. The whole burden of loss has been cast, now upon the servant who caused the damage, and now upon the master; whence it follows that there has been a disregard sometimes of 'security,' and sometimes of 'equality,' of which one or other ought to have the preference according to the nature of the case.

II. *Responsibility of a Guardian for his Ward.*—A ward cannot be accounted one of his guardian's assets; on the contrary, he is generally among the number of his burdens. If the ward has sufficient means to pay compensation, there is no need for anyone else to provide it for him. If he has no means, the wardship is in that event too heavy a burden in itself to bear the additional load of vicarious

Responsibility of Guardian for Ward.

responsibility. All that security demands is that there should be attached to the negligence of the guardian himself, proved or even presumed, some penalty, greater or less according to the nature of the facts established in evidence, but never in excess of the actual cost incidental to the provision of satisfaction.

**Responsibility of Father for Child.**

III. *Responsibility of a Father for his Children.*—If a master ought to be held responsible for the wrongful acts and defaults of his servants, much more should a father be responsible for those of his children. If a master can and ought to exercise supervision over those who are dependent upon him, the obligation is, in the case of a father, far more imperious and much easier to discharge. Not only does he exert over his children the authority of a domestic magistrate, but he possesses all the controlling influence that springs from affection. He is not only guardian of their bodies; he may even dictate the feelings of their souls. It is true that the master may refrain from engaging or keeping a servant who displays dangerous tendencies; but the father, who has had it in his power to fashion at will the character and habits of his children, is justly accounted the author of all their dispositions. If they are depraved, the cause of their depravity may almost always be traced to his vices or to his neglect; and he ought to bear the consequences of an evil which he might, by his own exertions, have prevented.

**Children form part of their Father's Property.**

If, after a consideration so cogent as this, there is any need for an additional reason, we may observe that (saving such rights as appertain to them in their quality of sentient beings) children form part of a man's property, and ought to be so regarded. Now, he who enjoys the advantages of possession must support its inconveniences; the good more than outweighs the ill. It would be very strange if the loss or destruction occasioned by children were to be borne by a person who knows nothing about them (except through some exhibition of their recklessness or malice),

rather than by the man who finds in them the source of his highest pleasures, and, with a thousand bright hopes, solaces himself for the present cares of their education. It was a maxim of the Roman law: *Qui sentit commodum sentire debet et onus.*

But to this responsibility there is a natural limit in point of time. The attainment of his majority by a son, or the marriage of a daughter, putting an end to the father's authority, brings to a close also his legal responsibility. He ought no longer to pay the penalty for an act which he no longer has the power to prevent.

*Limitation  
of Responsi-  
bility in  
point of  
Time.*

To continue the father's responsibility throughout life, on the plea that he is the author of the vicious dispositions of his children, would amount to cruelty and injustice. In the first place, it is not true that the vices of an adult are attributable solely to defects of education: for, after the age of independence is reached, various corrupting influences may triumph over the most excellent education. And, further than this, the condition of a father is already sufficiently afflicting when he finds that the evil tendencies of a son, grown to man's estate, have developed into open crime. After all that he has suffered beforehand in the family circle, the anguish that accompanies the misconduct and dishonour of his child comes as a sort of penalty inflicted by Nature herself, which the law has no need to aggravate. To do so would be to pour poison into his wounds, without any hope of thereby repairing the past or affording a safeguard for the future. Those who have sought to justify such a barbarous scheme of laws by an appeal to the jurisprudence of China have not remembered that, in the Chinese Empire, the father's authority extends throughout life, and it is not unreasonable that his responsibility should last as long as his power.

IV. *Responsibility of a Mother for her Child.*—The obligation of a mother is naturally regulated by her rights, on which her means of control depend. If the father be still

*Responsi-  
bility of  
Mother for  
Child.*

alive, the mother's responsibility, like her power, remains, as it were, merged in that of her husband. If he be dead, when she takes in hand the reins of domestic government, she at the same time assumes responsibility for those who become subject to her rule.

Responsi-  
bility of  
Husband  
for Wife's  
Torts.

V. *Responsibility of the Husband for his Wife.*—This case is as simple as the last. The obligation of the husband depends on his rights: if we suppose the administration of the property to be vested solely in the husband, an injured party would, in the absence of some joint responsibility, be left without remedy for a wrong inflicted by the wife.

Nevertheless, we here assume the disposition usually established: that disposition so necessary to the peace of families, the rearing of children, and the maintenance of manners and morality; the order of things, that has prevailed for all time and in every land, whereby the wife is subject to the authority of her husband. As he is her lord and her guardian, he must answer for her before the law. At the bar of public opinion, he is charged with a responsibility still more delicate; but this remark is not germane to our present subject.

Responsi-  
bility of one  
who has  
derived  
Profit from  
an Offence.

VI. *Responsibility of an Innocent Person who has profited by the Offence.*—It often happens that some person, without taking any part in an offence, yet derives from it a sure and appreciable profit. Is it not right that such person should be called upon to indemnify the party injured, in case the real culprit cannot be found, or is not in a position to make compensation?

The proceeding would certainly be conformable with the principles we have enunciated. First, due regard for 'security'; for the person benefited may have acted as an accomplice, although there be no evidence forthcoming to establish the fact. Secondly, due regard for 'equality'; for it is better that one person should be deprived of a gain than that another should be left in the condition of suffering a loss

A few illustrations will be enough to make the matter quite clear. We will suppose that, by cutting a hole in the bank of a dike, the benefit of irrigation is diverted from one man's estate to the property of another. The man who secures the enjoyment of this unexpected benefit ought to share at least some part of his gain with the land-owner who has suffered loss. Illustrations.

A tenant for life, whose property under an entail passes to some stranger in blood, is killed, and leaves behind him a family in distress for lack of funds. The successor, who takes under the entail, securing as he does premature enjoyment of the estate, ought to make some compensation to the children of the deceased.

An ecclesiastical benefice is vacated by the death of its holder, who has been killed, it matters not how. If he leaves a wife and children in poverty, his successor owes them an indemnity proportioned to their necessities and to the value of his own expectations from the living. There is a well-known maxim: *Neminem oportet alterius incommodo locupletiores fieri.*

## CHAPTER XXXII.

### OF SUBSIDIARY SATISFACTION AT THE PUBLIC CHARGES.

Satisfaction  
payable out  
of Public  
Funds.

THE best fund from which to take the sum due for compensation is the property of the culprit himself; for this course is, as we have seen, attended by the special convenience that then the payment fulfils also the functions of a punishment.

But if the culprit chance to have no means, should the party injured then remain without compensation? No. For reasons already explained, satisfaction is wellnigh as necessary as punishment. And it ought, in such case, to be paid out of the public exchequer, for the payment is a public benefit, closely concerning as it does the 'security' of the whole community. The obligation thus imposed on the exchequer is based upon a ground which has all the assurance of an axiom: a pecuniary burden, when shared amongst a large aggregate of individuals, amounts to nothing as compared with a like charge imposed on a single person or on a small group.

In the conduct of commercial undertakings, *insurance* has proved useful and, indeed, indispensable. It is not less so in the great social enterprise, wherein we, co-adventurers, find ourselves associated in a long train of risks, without any previous acquaintance, without any power of choosing or avoiding our partners, and without any opportunity of safeguarding ourselves, by prudent foresight, from the vast multitude of snares which may be set for us by our fellows. Calamities occasioned by crime are none the less real than those which arise from natural causes. If the master of

the house sleeps more soundly when it is insured against fire, his slumber would be sounder still were he also insured against theft. Apart from certain abuses to which insurance is subject, it would be impossible to extend too widely an expedient so ingenious and so capable of being rendered perfect in its working—an expedient which renders real losses so trifling, and gives so much security against consequential mischief.

All kinds of insurance are, however, subject to great <sup>Dangers of abuse.</sup> abuse from fraud or negligence. Fraud on the part of those who, to obtain indemnity when none is due, feign losses or exaggerate their extent: negligence, now on the part of the assurers, who omit to take necessary precautions, and now on the part of the assured, who fail to exercise reasonable care to prevent losses, knowing as they do that the burden will not ultimately fall upon themselves.

In a system of indemnities discharged by the public exchequer we should, therefore, have to fear—

(i.) A secret conspiracy between a person pretending to be injured and a person pretending to be the author of an offence, for the purpose of obtaining the grant of an indemnity where none was due.

(ii.) Too great security on the part of individuals who, having no longer cause to dread the same consequences from crime, would not make the same efforts to guard against it.

The second danger is, perhaps, little to be feared. No one is likely to neglect the property he holds, with assured and present possession, in the hope of recovering, in the event of loss, an equivalent for his lost property—at the most, a mere equivalent. Add to this consideration that the indemnity could not be secured without trouble and expense, that there must be a period of temporary deprivation, that he may have the worry of legal proceedings, he himself playing the disagreeable part of prosecutor; and that in the end, even under the most approved system, success

is always doubtful. There is, therefore, reason enough for everyone to keep a watchful eye on his property, and to take care that crime shall not be encouraged by his own negligence.

**Danger of Fraud.**

The danger is, however, much greater in the direction of fraud. It can only be obviated by elaborate precautions which will be explained elsewhere. It will serve here to point out, by way of illustration, two cases in strong contrast; one in which the utility of the remedy outweighs any danger of abuse, the other in which the danger of abuse outweighs the utility of the remedy.

**Where it is necessary to secure a conviction, and the penalty is severe.**

Suppose that the punishment for a particular crime is very severe, and that it is necessary, not merely to prove the fact of its commission, but to secure the actual conviction of its author in a criminal court. Where the damage is occasioned by such an offence, it seems to me that fraud is very difficult. All that the impostor, who pretends to have been injured, can do to secure an accomplice is to give him a certain share in the gains resulting from the fraud; but, unless there has been neglect of the plainest principles that control the relation between crime and punishment, the punishment to be borne by the accomplice would be more than equivalent to the aggregate of gain resulting from the crime. Note that the culprit must be judicially convicted before any satisfaction is awarded. Without this precaution, the exchequer would be freely plundered: nothing would be commoner than stories of imaginary thefts, of pretended robberies, committed either by unknown persons who had taken to flight, or by men who had done the deed in some secret fashion under cover of darkness. But, when it is necessary to produce a culprit, successful conspiracy is not so easy. The parts to be played are not such as can readily be filled up; for, besides the certainty of punishment for the man who is charged with the pretended offence, there is a further special penalty in case the imposture is detected—a penalty to be shared by both

conspirators. And when we consider, too, how difficult it is to fabricate a plausible account of a wholly imaginary crime, we may well believe that this class of fraud will be very rare, if, indeed, it be ever attempted.

The danger most to be apprehended is exaggeration of a loss resulting from an offence actually committed. But this can only happen when the offence lends itself to this form of falsehood, and that case is sufficiently rare.

It appears to me, therefore, that we may lay it down as a general maxim that, in case the punishment for an offence is severe, there is no need to fear that an imaginary culprit will seek to charge himself with crime for the sake of a doubtful gain.

But, reasoning contrariwise, when the damage results from an offence for which the penalty is trifling or non-existent, the danger of abuse would reach its highest point, in the event of the public exchequer being made responsible. The insolvency of a debtor is a case in point. Where is the beggar with whom people would refuse to do business if he could offer the public as his sureties? What treasure would be large enough to pay off all the individual creditors whose debtors had really left them in the lurch, and how easy would it not be to concoct false claims!

Where the penalty is trifling.

Such indemnification would not only be liable to great abuse, it would also be wholly unnecessary; for in commercial dealings the risk of loss is a factor in assessing the price of goods and in fixing the rate of interest. Let the merchant be sure of never making a bad debt, he would sell at a lower price; so that to call upon the public to make good a loss for which compensation has already been provided would be seeking to be paid twice over.<sup>1</sup>

<sup>1</sup> A voluntary subscription, a bank of insurance designed for the reimbursement of wronged creditors, might well prove a benefit, without it being at all desirable for the administrators of the public funds to start any such establishment. The public funds, being raised by compulsion, should be managed with the greatest economy (Dumont).

Further instances where Satisfaction should be awarded out of public Funds.

Physical Calamities.

Losses inflicted by public enemy.

Loss arising from miscarriages of Justice.

Open and public acts of violence.

There are still other instances in which satisfaction should be made at the cost of the public:

(a) Cases of physical calamity, such as floods and fires. Aid granted by the State in these cases is not afforded solely on the principle that the burden of an evil is lessened by distributing it amongst the community, but rather on the consideration that the State, as guardian of the national wealth, is interested in preventing any depreciation in the value of her domain, and in providing means of reproduction when any part of it has suffered damage. Of this class were the 'liberalities,' as they have been styled, of Frederic the Great towards provinces laid waste by pestilence; they were, in truth, acts dictated by prudence, and directed to the preservation of the State.

(β) Losses and misfortunes following in the wake of war. Those who have been subject to the incursions of a public enemy have a special and peculiar right to indemnity out of public funds; for they may properly be considered as having, by reason of their exposed situation, borne the brunt of an onslaught directed against the whole community.

(γ) Mischief resulting from honest mistakes on the part of ministers of justice. A judicial mistake is in itself an event to be deeply deplored; but that such a mistake, when discovered, should not be at once repaired by adequate compensation is nothing less than a direct subversion of the social organism. Ought not the State to conform with the same rules of equity that it imposes on the individual? Is it not shameful that the public should exact, in stringent fashion, everything that is owing to themselves, and yet refuse to restore what is due to a member of the community who has suffered a wrong? But the obligation is so manifest that one is afraid lest any attempt to establish its existence should appear to suggest some sort of doubt or obscurity.

(δ) Responsibility of the community for a crime of open violence committed in some public place within their

boundaries. It is not, properly speaking, the public exchequer which is chargeable in such a case, but rather the funds of the particular district or province which should be taxed to repair an offence resulting from neglect on the part of the local police.<sup>1</sup>

In the event of conflicting claims, the interests of an individual should be preferred to those of the treasury. What is due to the injured party by way of compensation ought to be paid before payment of any sum due to the exchequer by way of fine. This view is not adopted in ordinary systems of jurisprudence, but it accords with the dictates of reason. The loss experienced by an individual is an evil actually felt; a gain to the treasury is a good felt by nobody. What the culprit pays in the shape of a fine is a punishment and nothing more; what he pays in the form of compensation is also a punishment, even more severe, and in addition it is a satisfaction to the injured party—that is to say, a benefit. When I pay to the treasury, as an imaginary entity with which I have no quarrel, I only feel the same annoyance at my loss as if I had let a like sum of money fall into a well; but when I pay my adversary, when I am forced at my own expense to bestow a benefit on him whom I had sought to injure, that is a humiliating step which confers on the penalty a character well suited to its purpose.

Interests of  
the Indi-  
vidual  
to be con-  
sulted be-  
fore those  
of the  
Public

<sup>1</sup> See, as to compensation in cases of Riot, the note on p. 139 of vol. i. (C. M. A.)

## PART III.

### OF PUNISHMENTS.

#### CHAPTER XXXIII.

##### WHEN PUNISHMENT OUGHT NOT TO BE INFLICTED.<sup>1</sup>

THE cases in which punishment should not be inflicted may be reduced to four heads: (I.) When such punishment would be groundless; (II.) when it would be inefficacious; (III.) when it would be superfluous; and (IV.) when it would be too expensive.

Groundless  
Punish-  
ments.

I. GROUNDLESS PUNISHMENTS.—The punishment will be groundless where there has been no real offence, no evil either of the first or the second order; or where the evil will be more than compensated by some attendant benefit, as in the exertion of political or domestic authority, in repelling some graver evil, in self-defence, etc.

If the idea of a real offence has been grasped, we shall readily be able to distinguish between such an offence and offences attended only by some imaginary evil—acts innocent in themselves, but classed among crimes from prejudice, antipathy, mistake on the part of the government, or at the dictates of the ascetic principle, very much as certain wholesome foods are regarded by some nations as poisonous or unclean. Heresy and sorcery afford instances of this class of offence.

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. xiii.; and the 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*), chap. iv.; Bowring, vol. i., p. 397. (C. M. A.)

II. INEFFICACIOUS PUNISHMENTS.—I describe as *ineff-* Inefficacious Punishments.  
*acious* such punishments as cannot produce any effect on the will, and, consequently, cannot serve to prevent the commission of like acts.

Punishments are inefficacious when directed against persons who had no power or opportunity of acquainting themselves with the particular law; or who have acted unintentionally; or who have done the mischief innocently under a mistaken supposition or some irresistible compulsion. Children, idiots, and madmen, although they may, up to a certain point, be controlled by rewards and threats, have not a sufficiently clear conception of the future to be restrained by punishments to be inflicted at some distant date: so far as they are concerned, penal laws will, therefore, be inefficacious.

If a man's action is determined by a dread that is greater than his fear of the maximum legal penalty, or by the hope of some preponderant gain, it is manifest that the laws will exert but little influence over him. We have seen the enactments against duelling set at naught because the man of honour feared disgrace more than punishment. Penalties decreed against some particular form of worship fail as a rule to produce any effect, because the notion of an everlasting reward prevails over the fear of the scaffold. And, according as these views exert more or less influence, punishment becomes more or less inefficacious.

III. SUPERFLUOUS PUNISHMENTS.—Punishment would be superfluous in cases where the same end might be attained by milder means; for example, by such expedients as instruction, example, exhortation, delay, rewards.<sup>1</sup> A man, we will suppose, has been spreading abroad pernicious opinions; need the magistrate forthwith seize a sword to punish him? No; if, from some motive or other, this one man is minded to spread mischievous doctrines, it will be

<sup>1</sup> Cf. Seneca, *De Clementia*, lib. ii.: 'Nemo ad supplicia exigenda propenit, nisi qui remedia consumpsit.' (C. M. A.)

to the interest of a thousand others rather to refute his theories, and so, it may well be, to establish the truth more firmly than ever.

Unprofitable or too expensive Punishments.

IV. PUNISHMENTS TOO EXPENSIVE.—If the evil of the punishment exceeds the evil of the offence, the legislator will produce more suffering than he prevents. He will have purchased exemption from one evil at the price of a greater evil.

Comparison of evil of offence with that of punishment.

The reader should have two tables before his eyes, the one representing the evil of the offence, the other that of the punishment.

Now, the evil resulting from a penal law divides itself into five branches: (a) The evil of *coercion* or *restraint*: this consists in the privation imposed by the law, more or less painful, and varying with the degree of pleasure that the forbidden act would have conferred. (β) The *suffering* caused by the punishment, when a law-breaker is actually punished. (γ) The evil of *apprehension* undergone by a man who has broken the law, or fears that he will be charged with having broken it. (δ) The evil of *improper prosecutions*: this danger attaches to all penal laws, but particularly to obscure laws and to offences of which the mischief is imaginary. An antipathy, based on general grounds, often begets an alarming tendency to prosecute and to condemn on suspicion, and to be satisfied with a mere appearance of guilt. (ε) *Derivative evil*: suffered by the relations and friends of the man actually subject to the rigour of the law.

Such is the table of evils or *expenses* which the legislator ought to ponder every time that he prescribes any punishment.

Amnesty in the case of certain political offences.

It is from this source that we draw the chief reason for proclamations of a general pardon in the case of persons engaged in the complex offences that are engendered by party spirit. It may happen that the law involves within its meshes a host of such persons—sometimes half the aggre-

gate number of the citizens, or even more. If you determined to punish the whole of the culprits, or only a tenth part of them, the evil of the penalty would be greater than the evil of the offence.

We may add that, if a particular culprit were greatly beloved by the people, so that his punishment would create apprehension of national discontent; if he were protected by some foreign power whose goodwill it was desirable to conciliate; if he were in a position to do his country some distinguished service—in these special cases the grant of a pardon would be justifiable on considerations of *prudence*. It is not unreasonable to fear that the punishment of his crime would cost society too much.

## CHAPTER XXXIV.

### OF THE PROPORTION BETWEEN CRIMES AND PUNISHMENTS.

'Adsit

Regula, peccatis quæ poenas inroget æquas:  
Nam ut scutica dignum, horribili sectere flagello.'<sup>1</sup>

MONTESQUIEU saw the necessity of a due proportion between offences and punishments;<sup>2</sup> Beccaria enlarged upon its importance.<sup>3</sup> But they rather recommended the principle than threw light upon its meaning; they did not say in what this proportion consists. Let us try to supplement their views, and give the chief rules of this moral arithmetic.

Evil of  
punish-  
ment must  
outweigh  
Profit ob-  
tained  
through  
commission  
of offence.

FIRST RULE:<sup>4</sup> *See to it that the evil of the punishment shall outweigh the benefit accruing from the offence.*

The laws of the Anglo-Saxons, which set a price on the lives of men—e.g., 200 shillings for the murder of a peasant, six times as much for that of a noble, and thirty-six times as much for that of a king—in spite of their pecuniary ratios, evidently sinned against the rules of proportion prescribed by morals. It might well happen that the penalty would seem as nothing by comparison with the gain resulting from the crime.

We fall into the same mistake every time we fix a maximum penalty that cannot be exceeded in a case where the advantage of the offence may possibly be measured by a sum in excess of this maximum.

<sup>1</sup> Horace, *Serm.*, lib. i. (iii.), 117-119. (C. M. A.)

<sup>2</sup> Cf. *L'Esprit des Loix*, book vi., c. 16. (C. M. A.)

<sup>3</sup> Cf. chap. vi. of the essay on *Crimes and Punishments*. (C. M. A.)

<sup>4</sup> These Rules also appear in the 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*); Bowring, vol. i., p. 399. (C. M. A.)

Certain famous writers have sought to establish a contrary rule. They urge that the greater the temptation, the less should be the punishment; the temptation, they say, extenuates the fault, and the more powerful the seducing motives, the less reason have we for assuming the depravity of the wrong-doer's disposition.<sup>1</sup>

This may be true; but, nevertheless, our rule holds good, for, if the offence is to be prevented, the repressing motive must needs be stronger than the seducing motive. The fear aroused by the punishment must prevail over the desire that impels to the crime. An inadequate penalty does more harm than excessive rigour; for an inadequate penalty is an evil inflicted to no purpose. From it there results no good, either to the public, who remain exposed to similar offences, or to the culprit, who will be none the better for it. What should we say of a surgeon who, to spare his patient a modicum of pain, left the cure unfinished? Would it be a sensible or humane act to add to the malady the torture of a useless operation?

SECOND RULE: *The punishment must be increased in point of magnitude in proportion as it falls short in point of certainty.*

The more certain and speedy the punishment, the less the necessity for severity.

No man enters upon a career of crime without some hope of escaping punishment. If the penalty for an offence consisted in nothing more than taking away from the culprit the fruits of his crime, and from that penalty there was no possibility of escape, the particular offence would never be committed; for what man would be such a fool as to commit a crime with the certainty of getting nothing out of it, save the disgrace of having attempted it? The criminal reckons his chances *pro* and *con*, and, to outweigh the chances of escape without punishment, we must give a greater value to the penalty.

It is, then, true that the more certain we can make the punishment, the more may we reduce its severity. And

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. xiv (9). (C. M. A.)

this is, of course, one of the advantages which would assuredly result from simplifying legislation and introducing satisfactory rules of procedure.

By parity of reasoning, the punishment must follow the crime as quickly as possible; for the impression it makes on men's minds is weakened by lapse of time, and, moreover, any delay, in fact, adds to the uncertainty of the punishment by affording greater opportunities of escape.

Punishments should be such as to induce an offender to choose the less grave of two offences.

THIRD RULE: *When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.*<sup>1</sup>

We may say that two offences are in competition when a man has the power and the will to commit either of them. A highwayman may confine himself to robbery, or he may begin by murder and end by robbery. Murder should be punished more severely than theft in order to induce the culprit to refrain from the commission of the graver crime.

This rule would work admirably if it could be so arranged that for each portion of mischief done there could be a corresponding portion of punishment. If a man were punished for stealing ten crowns as severely as though he had stolen twenty, he would be a very stupid fellow who should choose to steal the smaller sum in preference to the larger. A like punishment for unlike offences often supplies a motive for choosing the graver offence.

Severe punishments should be reserved for serious offences.

FOURTH RULE: *The greater the mischief of the offence, the greater is the expense which it may be worth while to be at in the way of punishment.*<sup>2</sup>

We must not forget that the infliction of punishment is a certain expense to purchase a doubtful advantage. To apply severe punishments to small offences is to pay very dearly for the chance of escaping a slight evil. The English

<sup>1</sup> Cf. *L'Esprit des Lois*, book vi., c. 16 ; see *Principles of Morals and Legislation*, chap. xiv. (11). And cf. *post*, chap. xxxviii., 'Commensurability,' at p. 144. (C. M. A.)

<sup>2</sup> Cf. *Principles of Morals and Legislation*, chap. xiv. (x.). (C. M. A.)

law which condemned to the flames a woman who had uttered a piece of bad money was in direct conflict with this rule of proportion.<sup>1</sup> If burning alive be a punishment which should ever be adopted, it should certainly be reserved for incendiary homicides.

FIFTH RULE: *The same punishment for the same offence should not be inflicted on all culprits indiscriminately. We must take into account the several circumstances that influence sensibility.*<sup>2</sup>

Account must be taken of the circumstances influencing sensibility.

Punishments the same in name are not always the same in reality. Age, sex, rank, fortune, and many other circumstances, ought to modify the penalties imposed for offences of the same character. If we are concerned with some bodily injury, a given pecuniary penalty might prove a bagatelle to the rich man, an act of cruel oppression when inflicted on his poorer neighbour. In the case of ignominious punishments, a sentence which would brand a man of a certain rank with indelible shame might not even leave a stain on the character of one who belonged to the lower classes. A term of imprisonment might spell ruin to a business man, death to one who was old and ailing, lasting dishonour to a woman; and yet the same term might mean almost nothing to a person placed in wholly different circumstances.

I will add that there is no need for us to cling so closely to mathematical ideas of ratio as to render laws subtle, complex, or obscure. There is something even more important than that—brevity and simplicity. We may, too, sacrifice these ideas to some extent if by so doing we render the punishment more striking, and more calculated to inspire the people with a sentiment of aversion from such vices as pave the way for crime.

Rules not to be regarded as inflexible.

<sup>1</sup> Hanging was substituted in 1790 by 30 Geo. III., c. 48. (C. M. A.)

<sup>2</sup> Cf. ante, vol. i., chap. ix., p. 45; and see *Introduction to the Principles of Morals and Legislation*, chap. xiv. (14); *Théorie des Peines*, p. 29 (Bowring, 'Rationale of Punishment,' vol. i., p. 401). One of the rules in the *Principles of Morals and Legislation* (chap. xiv. [12]), as to punishment for 'each particle of the mischief,' does not appear either in the *Traité* or in the *Théorie des Peines*. (C. M. A.)

## CHAPTER XXXV.

### OF PRESCRIPTION IN THE MATTER OF PUNISHMENT.

Should we  
accept the  
maxim:  
*Nul-  
lum  
tempus  
occurrit  
regi?*

OUGHT punishment to be cancelled by lapse of time? or, in other words, if the culprit can manage to evade the law for a given time, ought he to be altogether discharged from liability?<sup>1</sup> Should the law take no further cognizance of his offence? This has been, and continues to be, a moot question. Indeed, if the principle underlying such a privilege were accepted, there would still remain much that is arbitrary; not only in the choice of crimes to which the immunity should attach, but also in the number of years after which it should become operative.

Exception  
might be  
allowed in  
case of  
offences  
originating  
in rashness  
or negli-  
gence.

So far as concerns offences that take their origin in mere rashness or negligence, unaccompanied by any evil intent, a pardon of this kind might be extended without fear of ill consequences. From the very hour of the mishap, the delinquent has been on his trial and constantly on his guard against careless conduct. He is no longer a man who need cause any alarm: his pardon would be a boon to him, and do no harm to any of his fellows.

And in case  
of abortive  
attempts.

We might further extend prescription to offences that are not fully perpetrated, to abortive attempts. During the interval the culprit has undergone his punishment in part; for to dread it in the future is to undergo it in the present. Besides, he has probably abstained from like offences; he has reformed, and become once more a useful member of society. He has regained his moral health,

<sup>1</sup> Cf. 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*, book vi., c. 4: 'Defeatance of Punishment by 'Length of Time'; Bowring, vol. i., p. 521). (C. M. A.)

without taking the bitter draught prepared for him by the law.

But when we are concerned with men guilty of 'major' offences—for example, the misappropriation of funds that may constitute another man's whole fortune, polygamy, rape, or robbery—it would be a shocking and fatal mistake to suffer villainy to triumph over innocence by mere lapse of time. There should be no truce, no treaties, with such rascals; the avenging sword should ever hang over the malefactor's head. The sight of a criminal enjoying the fruits of his crime in peace, under the ægis of the very laws he has set at naught, is to evil-doers a source of joy and refreshment; to honest folk it brings sorrow and despair; while to justice and morals it is nothing short of a public insult.

But no exception in case of serious crime.

To grasp fully the absurdity of impunity conferred by mere lapse of time, we need only conceive the law expressed in some such terms as these: 'But if the assassin, the thief, the fraudulent appropriator of another man's goods, shall succeed for the space of twenty years in eluding the vigilance of the courts, his skill shall be duly rewarded, his safety shall be once more assured, and the fruits of his crime shall become his lawful property.'

## CHAPTER XXXVI.

### OF INDIRECT AND MISDIRECTED PUNISHMENT.

PUNISHMENT ought to fall directly upon the individual whom we wish to subject to its influence.<sup>1</sup> If you wish to influence Titius, it is Titius to whom you must apply yourself. If a punishment designed to influence Titius is borne by some person other than Titius, it cannot be denied that it is misdirected.

How far is it right to allow punishment to fall on persons other than the offender ?

But it will be said that a punishment directed against those who are dear to him is a punishment of the man himself; for he shares in the suffering of those to whom he is bound by bonds of sympathy, and in this way we have a hold upon him through the medium of his affections.

This assertion is true enough; but is it desirable to apply the doctrine? Is such a course conformable with the principle of Utility?

To ask whether a punishment of sympathy is as effective as a punishment operating directly is to ask whether, in general, the affection we feel for others is as powerful as the love of self. If self-love is the stronger sentiment, it follows that recourse should not be had to punishments of sympathy till we have exhausted all the direct sufferings of which human nature is susceptible. There is no torture, howsoever cruel, that should not be employed before punishing a wife for the act of her husband, or the children for the sins of their father.

<sup>1</sup> The subject of 'Misdirected Punishment' is discussed at length in the 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*, book iv.; Bowring, vol. i., p. 475). (C. M. A.)

To indirect or misapplied punishments of this kind I notice four principal objections: (a) What can we think of a punishment which must often fail for want of objects to which it can be applied? If, in order to cause suffering to Titius, you cast about to find the persons who are dear to him, you have no guide other than the domestic relations; and, led by that thread, you reach his father, his mother, his wife, and his children. The most cruel tyranny would go no farther. And yet there are many men who have neither father nor mother, wife nor children. To this class of men we must needs, therefore, apply some direct punishment; and if a direct punishment will serve for them, why will it not suffice in the case of others?

*Objections to indirect or misapplied punishments.*

(β) Again, does not this form of punishment presuppose the existence of sentiments which may not exist at all? If Titius cares nothing for his wife or his children—if he has, indeed, conceived a dislike to them—he will, to say the least, be indifferent to any ill that may befall them, and this part of his punishment will thus prove wholly ineffective.

(γ) But the most alarming feature of this scheme consists in the endless multiplication of attendant evils. Consider the chain of domestic connections, reckon the possible number of a man's descendants: the punishment is communicated from one to another, it spreads from point to point like some pestilence, it embraces a host of individuals. To produce a direct punishment which shall be equivalent to unity, we are to create an indirect and ill-directed punishment equivalent to ten, twenty, thirty, a hundred, a thousand, etc.

(δ) Punishment, thus diverted from its natural channel, has not even the advantage of conforming with the general sentiment of sympathy and antipathy. When the culprit has paid his personal debt to Justice, public vengeance is appeased and asks for nothing more. But, if you pursue him beyond the grave by inflicting punishment on his inno-

cent and unhappy family, public pity is soon aroused, a vague indefinite sentiment charges your laws with injustice. humanity declares against you, and every day enlists fresh supporters for the cause of your victims. In the hearts of all men there is a less assured feeling of respect for the laws, and less confidence in the government; while the whole result of this mistaken policy is that your lawgivers will seem fatuous in the eyes of sensible people, and barbarous in the eyes of the general public.

A certain amount of indirect Punishment is inevitable.

So complex are the ties which bind a man to his fellows that it is, no doubt, impossible completely to separate the lot of the innocent from the fate of the guilty. The ills that the law designed to fall on a single individual overflow, so to speak, and extend to many others, at every point where there is to be found a common sensibility resulting from the affections, from honour, or from reciprocal interests. A whole family is plunged into suffering and tears for the crime of a single person. But this misfortune, depending as it does on the very nature of things, this evil that not all the wisdom, all the goodwill, of the legislator can wholly avert, is in no way a reproach to him, and does not constitute a misapplication of punishment. If a penalty is inflicted on the father, we cannot prevent it from operating to the prejudice of the son; but if, after the death of the guilty sire, we deprive the innocent child of his succession to the paternal property, that is a deliberate act of the legislator, who thus causes the punishment to overflow and spread beyond its natural channel.

Duties of the Legislator in this regard.

The legislator has, in this regard, two duties to fulfil. First, he must avoid any punishment such as would, in its original application, fall on the wrong shoulders. The innocent son of the most degraded criminal ought to be as fully protected under the sheltering ægis of the law as the chiefest among the citizens.

In the next place, he should reduce to its lowest dimensions such portion of any penalty as extends beyond the

culprit himself, and falls on innocent persons, by reason only of the direct punishment imposed on the guilty man. Suppose, for example, that a rebel is condemned to life-long imprisonment or to death: everything has been done, as against him, that can be done. A complete confiscation of his property, to the prejudice of proper heirs, at any rate so far as regards his wife and children, would be an odious act of tyranny. Indeed, the rights of an unhappy family, who have just been smitten in the person of their head, ought on that account to be specially respected. A national treasure composed of such forfeit spoils as these may be likened to foul and deadly vapours that bear in their bosom the seeds of infectious disease.

I will here confine myself to a bald enumeration of the most common cases in which legislators have misapplied punishments, by causing them to fall upon the innocent with the object of striking thereby a blow at the guilty.

Illustrations of misapplied Punishments.

(i.) *Confiscation*.—This relic of barbarism still finds a place in the jurisprudence of nearly every European nation.<sup>1</sup> It is applied to many offences, and in particular to State crimes.<sup>2</sup> This punishment is the more hateful, because it cannot be employed until the danger is overpast; and the more ill-advised, because it prolongs animosity and a thirst for vengeance when even the memory of the calamities should be buried in oblivion.

Confiscation.

(ii.) *Corruption of Blood*.—This is a cruel fiction of the lawyers, who invented the absurd doctrine to cover up the

Corruption of Blood.

<sup>1</sup> 'By the end of the twelfth century,' writes Mr. E. Jenks, in his *Short History of English Law*, p. 41, 'conviction of felony worked a forfeiture, not only of chattels but of the offender's land.' Such forfeiture was abolished in 1870 by 33 and 34 Vict., c. 23. (C. M. A.)

<sup>2</sup> Confiscation for State crimes ought hardly to be looked upon from the point of view of a judicial penalty; for, speaking generally, civil wars do not involve criminality, both parties acting in good faith. Confiscation is a purely hostile measure. To leave their fortunes intact would amount to leaving munitions of war in the hands of the enemy. But a precaution of warfare, to which recourse should be had only in extreme cases, ought, when the danger is past, to be got rid of altogether or modified as much as possible (Dumont; see his Introduction to Vol. ii. of the *Traité de Législation*, at pp. xiv, xv). (C. M. A.)

injustice of confiscation. The innocent grandson cannot inherit from the innocent grandfather because, forsooth, his rights are abridged or destroyed in passing through the blood of the guilty father. This corruption of blood is a purely fantastic notion; but there is corruption, real enough, in the hearts and minds of those who dishonour themselves by such atrocious sophisms.<sup>1</sup>

Depriving  
a Corpora-  
tion of  
Privileges.

(iii.) *Loss of Privileges, whereby a Whole Corporation is punished for Malversation on the Part of Certain of its Members.*—In England the city of London rejoices in a special Act which exempts it from this degradation;<sup>2</sup> but where is the city or corporation which ought to be subject thereto, always supposing that its privileges are not in conflict with the interests of the State?

The treat-  
ment of  
Bastards.

(iv.) *The Disastrous Fate of Bastards.*—I do not here refer to their incapacity to inherit. The deprivation of that right is no more a legal punishment in their case than in the case of the younger sons of a family; while innumerable disputes might arise if heirs could be put forward whose birth had not the seal of publicity. But the incapacity to fill certain offices, the deprivation of many public rights, in certain European States is in very truth a penalty falling upon the innocent for the folly and wrong-doing of those who brought them into the world.<sup>3</sup>

<sup>1</sup> In his Introduction to vol. ii. Dumont wrote: 'Je me reproche une ou deux expressions violentes . . . les épithètes d'absurde et d'atroce ne tendent point à éclairer les esprits, et n'appartiennent qu'au style déclamatoire, qu'on ne doit pas se permettre dans un ouvrage de raisonnement' (*Traité*, vol. ii., XV.). (C. M. A.)

<sup>2</sup> The reference appears to be to 2 W. and M., st. 1, c. 8, whereby it was enacted that the franchise of the city should never thereafter be seized or forfeited for any forfeiture or misdemeanour whatsoever. By Magna Carta, c. 9, the ancient usages, liberties, etc., had been preserved to the city, and this provision was confirmed by 14 Edw. III., st. 1, c. 1; but in Trinity term 35 Car. II. it seems to have been adjudged that the charter and franchises of the city should be seized into the King's hands as forfeited. (C. M. A.)

<sup>3</sup> In ancient times a bastard, even in England, was incapable of Holy Orders; and, although a dispensation were obtained, he remained wholly disqualified from filling any office of dignity in the Church. But this doctrine had become obsolete before Bentham wrote. (C. M. A.)

(v.) *Infamy attached to the Kinsmen of those who have committed Serious Crimes.*—We are not here concerned to consider any stigma such as might well attach from the mere operation of public opinion. Opinion on this point has assumed its character of antipathy by reason only of the mistakes of legislators who have, in many cases, branded the family of the criminal. Little by little this injustice is being righted.

## CHAPTER XXXVII.

### ON THE FINDING OF SECURITY.<sup>1</sup>

The finding  
of Sureties.

To require *Security* amounts to calling upon a man, who is thought to be about to commit some act which should be prevented, to find another person who will subject himself to a certain penalty should the act be committed.

At the first blush, the requirement of such pledges would appear to conflict with the principles we have just enunciated, since it would expose the innocent surety to a risk of undergoing punishment in lieu of the person really guilty of the wrongful act. We must, then, seek its justification in some countervailing advantage more than equivalent to the evil already indicated. And this advantage consists in the great probability of preventing an offence, and of assuring public safety, by means of private and individual responsibility.

Direct  
Advantages  
of the  
Procedure.  
Its effect  
on the  
Principal.

The chief merit of this procedure consists in the important influence which is thereby exerted over the conduct of the suspected individual. Let us picture what is passing through his mind. Generous friends have just given him a touching and decisive proof of their confidence or affection, by risking their wealth and imperilling their position to preserve his honour and his liberty. They have, as it were, of their own free will, delivered themselves as hostages for him: can he possibly be base enough to turn their kindly offices to their own hurt? Can he stifle every sentiment of gratitude, openly declare himself a traitor to friend-

<sup>1</sup> Cf., too, 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*, book vi., chap. iii.: 'Of Surety for Good Conduct'; Bowring, vol. i., p. 519). (C. M. A.)

ship, and condemn himself thereafter to live in solitude, a prey to remorse ?

But even supposing that, reckless, inconsiderate, or vicious,<sup>1</sup> he is not minded to put restraint upon himself, the requirement of sureties is far from being useless. Those who are now responsible for him, being deeply concerned in his movements, become guardians provided by the law; their vigilance will be a substitute for his, and they will keep a very close watch upon his proceedings. To their great personal interest in making him hearken to their counsels they add the strongest possible rights, by reason of the good offices they have just rendered him, and of the power, which they should always enjoy, of withdrawing from their suretyship and abandoning him to his evil fate. Thus it is that this expedient operates to prevent the commission of crime.<sup>1</sup>

*Its effect  
on the  
Sureties.*

In yet another way the process serves to diminish 'alarm,' because it supplies the means of forming a judgment as to the character and resources of the suspected individual. It is a kind of contract of insurance. For example, you ask for the imprisonment of a man who has sought to do you a certain wrong: one of his friends comes forward and disputes the necessity for employing so rigorous an expedient. Says he: 'I, who should know him better than you, warrant you that you have nothing to fear at his hands. This penalty, which I agree to forfeit in case I am mistaken, serves as a pledge of my sincerity and of my confidence.'

*The Pro-  
cedure  
serves to  
diminish  
'Alarm'  
in other  
ways.*

And herein we see the merit of suretyship for good behaviour. It may give rise to an evil; but we must contrast that evil with the attendant advantages, and, in particular, we should have regard to the rigorous measures it would

<sup>1</sup> A justice of the peace, by virtue of his commission, or one who is *ex officio* a conservator of the peace, may exact such security where an offence is apprehended. The statute 34 Edw. III., c. 1, which empowers justices to bind over to the *good behaviour*, has long been regarded as enabling them to bind a man to his good behaviour for causes of scandal *contra bonos mores*, as well as *contra pacem* (*cf. Lansbury v. Riley*, 29 T.L.R., 733). (C. M. A.)

be necessary to employ at the expense of suspected persons if sureties were not accepted. When evil does result to the surety, that is to say in the shape of forfeiture, the evil, having been incurred of his own free will, occasions neither 'danger' nor 'alarm.' If, through misdirected zeal or folly, the man has given security with his eyes shut, the consequences concern him alone; and none other need fear a like fate for himself. But in most cases the engagement of the bondsman is based on a feeling of security. The man who becomes surety for another usually knows better than anyone else the true character and position of his principal. He is fully aware of the risk he runs; but he does not incur it unless he has come to the conclusion that the danger will never be actually encountered by him.

Circumstances in which Sureties should be required. The Prevention of Duels.

Let us now consider the circumstances in which it is well to employ this expedient.

(a) It is useful in averting such offences as may be expected to follow in the wake of quarrels arising out of personal hostility or in matters of honour—especially duels. We cannot, as a rule, suspect this type of delinquent of any lack of sensibility to public opinion; it is, indeed, a notion of honour that forces the weapon into his hands. But honour surely enjoins vengeance in a less positive manner than it forbids ingratitude, and, in particular, such black ingratitude as would actually allow a benefactor to be punished for, and by means of, his kindly offices.

Prevention of Breaches of Trust.

(β) The procedure is, again, remarkably well suited to prevent the abuse of confidential relations—offences which are in the nature of breaches of trust.

No one is compelled to seek employment in places of trust; and it is desirable that such employment should be confided only to men who have, in wealth or reputation, the wherewithal to furnish a sufficient guarantee of good conduct. We may, moreover, point out that the security exacted, being attached and incidental to the office, the requirement of it cannot be regarded as an affront. \*

(7) This expedient may prove specially useful in certain political situations, in the case of plots against the State undertaken by a number of conspirators united for a common purpose. Such offenders, often misguided rather than bad men, cherish lofty sentiments of honour and affection, and, in the very midst of their revolt against society, almost always maintain close relations with it. When such a plot is brought to light, the conspirators, to whom the gravest suspicion attaches, should be required to give security for good conduct. This expedient, which at first sight seems feeble enough, is really very effective—not merely because the principals, knowing themselves to be under supervision, accept the warning; but, even more, because the sentiment of honour to which we have referred supplies a real or plausible motive—a motive based upon justice and gratitude—for abandoning the enterprise.

*Abatement  
of political  
Disorders.*

(8) When sureties are exacted to prevent the disappearance of an accused person during the pendency of criminal proceedings, the special advantage thereby secured is the check imposed upon the vagaries of the Judge. Unless such bail were required, a corrupt or easy-going magistrate might, under the pretext of provisional release from custody, relieve a guilty man accused of crime from any possibility of corporal punishment, or, indeed, of pecuniary penalty. He would thus be enabled to convert a more serious punishment into one of simple banishment. Such an abuse becomes impossible when the Judge has no power to give the prisoner his liberty save upon the procurement of adequate security.<sup>1</sup>

*Bail in  
criminal  
cases.*

I will say but a single word as to the nature of the punishment to which sureties should be liable; it ought to be a pecuniary penalty, and never anything else. Any form of afflictive punishment would arouse indignation, and would not make amends in any way. It is true that the imposi-

*Liability  
of the  
Surety.*

<sup>1</sup> A justice may admit to bail for any felony (except treason), and he may now dispense with sureties (61 Vict., c. 7). (C. M. A.)

Liability  
of the  
Surety—  
could.

tion of a pecuniary penalty may be followed by the imprisonment of the surety in case he is unable to meet the claim of forfeiture; but if he were already insolvent when he entered into the engagement, he practised deceit upon the court. If, on the other hand, his insolvency arose at a later period, he should at once have withdrawn from his obligation and obtained release in due form of law.<sup>1</sup> However, as in the case of other insolvent persons, he must be dealt with according to the special circumstances, wrongdoing being carefully distinguished from misfortune or mistake. But, anyhow, if his engagement of suretyship were itself the direct cause of the man coming to grief, we should extend to him a peculiar degree of indulgence.

<sup>1</sup> A surety, who is bound as bail for the appearance of an accused person, may deliver up such person and so release himself; but a surety for the peace or for good behaviour cannot absolve himself from his obligation. (C. M. A.)

## CHAPTER XXXVIII.

### OF THE CHOICE OF PUNISHMENTS.

IN order that a punishment may conform with the rules of proportion already laid down, it should be distinguished by the following qualities:<sup>1</sup>

1. *It ought to be susceptible of being rendered greater or less*, so that it may be adjusted to the varying grades in the gravity of offences. Punishments extending over a considerable period of time, such as banishment and imprisonment, possess this quality in a peculiar degree. They are divisible into portions of any magnitude required; and the same thing is true of pecuniary penalties.

2. *Equality*, or equability, by adjustment to the particular surroundings. Punishment ought, within certain definite limits, to be rendered the same for several individuals guilty of like offences, by being made to correspond with their various measures of sensibility. This will of necessity demand attention to age, sex, condition, fortune, individual habits, and many other circumstances; otherwise, punishments nominally the same, being found too severe for some persons and too mild for others, will now overshoot the mark, and anon will fail to reach it. A fine, fixed by law at a given amount, can never be a punishment possessing this kind of equality, by reason of the great disparity in the fortunes of different offenders. Banishment, again, is open to the same objection: to

<sup>1</sup> 'Equal to itself'—  
i.e., such that the severity may be uniform, when applied to different offenders.

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. xv. And see 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*, book. i., chap. vii.: 'Of the Properties to be given to a Lot of Punishment'; Bowring, vol. i., p. 402). (C. M. A.)

one man it comes as a crushing blow; to another it may be no punishment at all.

Commensurability with other punishments.

3. *Commensurability*.—If a man contemplates the commission of one or other of two offences, the law should supply him with a motive for abstaining from the graver of the two; and this motive there will be if it be made clear to him that the more serious offence will involve the more drastic punishment. He must, then, be placed in such a position as to be able to contrast the penalties and gauge the several degrees of severity.

Now, there are two methods of achieving this result: (a) By adding to a given punishment a further portion of the same kind of punishment; for example, to five years' detention in gaol for such and such an offence, two years more for such and such an aggravation: (β) by adding some punishment of a different kind; for example, to five years' detention in gaol for such and such an offence, the addition of public ignominy by some mark of disgrace for such and such an aggravation.

Analogy to the offence.

4. *Analogy to the Offence*.<sup>1</sup>—A punishment will impress itself more readily on the memory and present itself more vividly to the imagination if it bears some resemblance to the offence—that is to say, if it has with it some analogy, some common characteristic. The *lex talionis* is admirable in this regard: *An eye for an eye, and a tooth for a tooth*, etc. The feeblest intelligence is capable of such an association of ideas. But to apply this law of retaliation is rarely practicable, while the punishment, if applied, would generally prove of too expensive a description.

There are other expedients based on the doctrine of analogy. Seek, for example, to probe the motive which led to the commission of the offence, and, in your search, you will usually discover the ruling passion of the culprit, so that you will be able, as the saying is, to punish him with

<sup>1</sup> In the *Introduction to the Principles of Morals and Legislation* (chap. xv. [7]), Bentham styles this property 'Characteristicness.' (C. M. A.)

the very weapon whereby he wrought the wrong. Offences based on covetousness will best be punished by pecuniary fines, if the means of the offender permit; offences of insolence, by humiliation; offences of idleness, by compulsory labour or periods of enforced inaction.<sup>1</sup>

5. The punishment should be *exemplary*. A penalty which, though real, was not apparent would be lost upon the public. The great art consists in augmenting the apparent, without adding to the real or actual punishment. This end may be attained either by care in the choice of the penalties themselves, or by accompanying their infliction with solemn and impressive ceremonies.

The *auto-da-fé* would be one of the most useful inventions of Jurisprudence if, instead of being an act of 'faith,' it was an act of 'justice.' What is a public execution? A solemn tragedy presented to the assembled crowd by the legislator: a tragedy of vast importance, and one full of pathos from the sad reality of the catastrophe and the gravity of its object. The preparations, the scene, the trappings, cannot be too carefully studied, since upon them the effect mainly depends. The tribunal, the scaffold, the robes of the officers of justice, the garb of the culprit himself, the religious service, the procession, every accompanying circumstance, should wear a grave and mournful aspect. Why should not the very headsman be shrouded in mourning crape? The terror of the scene would be thereby enhanced; while those useful servants of the State would themselves be shielded from the unjust hatred of the people. If the illusion could be successfully maintained, the whole

<sup>1</sup> Montesquieu fancied that by this simple expedient we might get rid altogether of the arbitrary character of punishments (cf. *Esprit de Lois*, book xii., chap. iv.). The same page affords a striking illustration of the mistakes into which he was led by this false notion. For offences against Religion he proposes religious penalties—that is to say, penalties which would be of no effect: for to punish the perpetrator of sacrilege or of an act of impiety by expulsion from places of worship is not to punish him at all; it is merely depriving him of something to which he attaches no value (Dumont).

scene might well be enacted by figures in effigy. For the *reality* of punishment is only necessary to preserve the *appearance* of it.

**Frugality.** 6. Punishment should be *economical*—that is, should be marked by such degree of severity only as is absolutely necessary to achieve its purpose. Anything which goes beyond the need of the occasion is not merely superfluous; it actually begets a host of inconveniences which tend to defeat the ends of justice. Pecuniary penalties possess this characteristic in a peculiar degree, inasmuch as the whole of the evil experienced by the man who has to pay is turned to the advantage of him who is to receive.

**Remissibility.**

7. *Remissibility or Revocability.*—We must see to it that the damage sustained shall not be wholly irreparable, for cases occur in which it is found that punishment has been inflicted without any just cause. So long as human testimony is susceptible of inaccuracy, so long as appearances are deceitful, so long as mankind have no certain touchstone to distinguish the false from the true, one of the most important safeguards that men are bound to provide for their fellows springs from the refusal to allow (save in the case of proved necessity) any punishment which is wholly irreparable. Have we not seen all the appearances of guilt accumulate upon the head of an accused person whose innocence has not been established until it was too late, when nothing remained but to lament the errors of presumptuous haste? Frail and inconsistent as we are, we judge like fallible beings, but we punish as though we were infallible.

To these important attributes we must add three others which, though of less pronounced utility, must be kept well in view, if they can be secured without detriment to the great end and aim of punishment—to wit, example.

**Subserviency to Reformation.**

(a) It is an excellent quality in a punishment that it is calculated to conduce to *the reformation of the delinquent*. I do not mean merely through fear of undergoing punishment a second time, but by reason of a change in his

character and habits. This end may be attained by studying the motive which led to the commission of the offence, and by imposing such a penalty as will tend to weaken or impair that motive. In order to fulfil this object, a house of correction should be so regulated as to admit of a separation of the prisoners into different classes or divisions, with a view to adapting diverse methods of education and treatment to their varying moral moods and conditions.

(B) *Taking away the Power to do Injury.*—This is an end that can be attained much more readily than the correction of delinquents. Mutilations and lifelong imprisonment possess the attribute, but the spirit that suggests the desirability of such a property in a punishment is apt to lead to excessive rigour. It is by yielding to its influence that the penalty of death has been so frequently exacted.

Property  
of Disable-  
ment.

If, indeed, there are any cases in which the power to do injury can be taken away in no other manner than by destroying the life of the culprit, they can only arise on very extraordinary occasions—as, for example, during civil war, when the mere name of some leader, so long as he is alive, may be enough to keep a whole nation in a flame. But, when resorted to in the case of actions of so questionable a nature,<sup>1</sup> the man's death may seem to savour more of hostility than of punishment.

(γ) Another useful quality in a punishment is that it should supply *indemnity to the injured party*. This is an expedient whereby we kill two birds with one stone—we punish the offence and make reparation for it, we get rid of all the mischief of the first order and at the same time put an end completely to the 'alarm.' This is a characteristic advantage of pecuniary penalties.

Subservi-  
ency to  
Compensa-  
tion.

<sup>1</sup> No really effective steps were taken to accomplish this object until the Prison Act, 1898 (61 and 62 Vict., c. 41, s. 6). (C. M. A.)

<sup>2</sup> I.e., 'in which the question concerning criminality turns more upon success than anything else' (*Introduction to the Principles of Morals and Legislation*, chap. xv. [19]). (C. M. A.)

Absence of  
'Popu-  
larity' as a  
property  
of Punish-  
ment.

I will conclude this chapter by a general observation of supreme importance: *In the choice of punishments, the legislator should be scrupulous to avoid all such as shock established prejudices.* If the people have conceived a pronounced aversion from punishment of a particular kind, it should not be admitted into the penal code (although in other respects endowed with every desirable attribute), inasmuch as it would undoubtedly do more harm than good. To begin with, it is an evil to arouse in the public at large a sensation of pain by establishing an unpopular form of punishment. We thereby punish not only the guilty, but also many mild and harmless persons, upon whom we inflict a penalty real enough, though it bears no particular designation; for we wound their susceptibilities, scout their opinions, and present to their minds an image of tyranny and brute force. What is the certain consequence of conduct so indiscreet? By setting public sentiment at naught the legislator turns it imperceptibly against himself. He loses the aid that private individuals, of their own free will, lend to the execution of the law when it happens to be acceptable to them; the people, no longer his allies, have become his foes.<sup>1</sup> Some seek to facilitate the escape of the guilty; others scruple to denounce them; witnesses, so far as they can, hold back from testifying; and insensibly there arises a fatal prejudice, which attaches to the service of the law a sort of shame and reproach. The general discontent may even go farther; it develops at times into open resistance—resistance, it may be, to

<sup>1</sup> Cf., e.g., the punishment inflicted on Lord Cochrane, in 1814, for having engaged in a conspiracy to raise the price of the public funds. He was expelled the House of Commons, fined £1,000, sentenced to a year's imprisonment, and to the pillory, a form of punishment which many persons desired to see abolished altogether. 'The punishment of the pillory,' wrote Romilly, 'shocked everybody, and induced thousands to take a lively interest for him' (*Memoirs*, vol. iii., p. 150). Within a fortnight Cochrane was re-elected for Westminster without opposition, Sheridan (the prospective candidate) announcing that Cochrane was the only man in the kingdom he would not oppose. The Government found itself compelled to remit the punishment. (C&M. A.)

officers of Justice, or, it may be, resistance to the execution of the sentences of the law. A successful struggle against authority comes to be regarded by the people as a victory; while the culprit, scatheless and triumphant, exults over the humiliated laws.

Unpopular  
Punish-  
ments—  
could.

Now, what is it that makes a particular form of punishment unpopular? It is almost always because it is ill-chosen. The more closely a penal code conforms with the rules we have laid down, the more certain is it to secure the enlightened approval of the wise and the sentimental applause of the multitude. Its punishments will be looked upon as moderate and just; while people will be especially struck with their suitability, with their analogy to the offences, and with that scale of gradation whereby an aggravated penalty is made to correspond with an aggravated crime, and a milder penalty is associated with a milder form of crime. Perception of this kind of merit, based as it is upon domestic and familiar notions, is within the compass of the most ordinary intelligence; and nothing is more calculated to instil the idea of paternal government, to inspire confidence, and so to bring public opinion into line with authority. When the people are found in league with the laws, the criminal's chances of escape are reduced to the lowest possible point.

## CHAPTER XXXIX.

### OF THE VARIOUS CLASSES OF PUNISHMENTS.

THERE is no punishment which, taken singly, combines all the requisite attributes. In order to attain our object, it is therefore necessary to have a choice among several punishments, to be able to vary them, and to employ more than one kind in the imposition of a single penalty.

In the same way medical science offers no panacea; recourse must be had to a number of expedients, varying with the nature of the ailments and the temperament of the patients. The art of medicine consists in the study of all conceivable remedies, in combining them, and adapting them to the circumstances of the particular case.

The catalogue of Punishments corresponds with that of Offences.

The catalogue of Punishments is similar to that of Offences. The same evil may constitute either a Punishment or an Offence, according as it is wrought under the authority of the law or in violation of the law; so that the nature of the evil is the same in either case, but what a vast difference in the effect! The offence spreads 'alarm,' the punishment re-establishes 'security.' The offence is, as it were, an enemy to everyone, while punishment plays the part of a common protector. For the advantage of but one man the offence begets evil, spreading in every direction; through the sufferings of but one man the punishment produces good, generally diffused. If we suspend punishment, the world becomes a stage for the display of robbery with violence, and society is dissolved; restore it,

and the passions are at once allayed, order is re-established, and individual frailty finds a prop and protector in the public strength.

The whole penal question may be ranged under several heads, which we now proceed to enumerate:<sup>1</sup>

1. *Capital Punishments*.—Such as at once put an end to the life of an offender. Capital Punishments.

2. *Afflictive Punishments*.—I so describe such as consist in forms of corporal suffering, which produce only a temporary effect—for instance, flagellation, enforced abstinence from food, etc. Afflictive Punishments.

3. *Indelible Punishments*.—Such as produce on the body a permanent effect—for example, branding, or the amputation of a limb. Indelible Punishments.

4. *Ignominious Punishments*.—The principal object of such penalties is to expose the culprit to the scorn of the onlookers, and to cause him to be regarded as unfit for the society of his former friends. The *amende honorable* supplies us with an example. Ignominious Punishments.

5. *Penitential Punishments*.—Designed to excite the feeling of shame, and to expose to a certain degree of censure, they are yet not severe enough or public enough to entail infamy, nor to cause the culprit to be looked upon as unfit for the society of his former friends. They constitute in the main such chastisement as a father would inflict on his children; and the most loving parent should feel no scruple in inflicting correction on a child to whom he is most tenderly attached. Penitential Punishments.

6. *Punishments extending over a Period of Time*.<sup>2</sup>—Their rigour consists mainly in their duration, so that they would almost amount to nothing apart from that circumstance; such are exile and imprisonment. They may be either permanent or temporary. Chronical Punishments.

<sup>1</sup> 'La classification des délits dans les *Traité*s, où onze classes sont distinguées, est superficielle et confuse' (Halévy, i. 316). (C. M. A.)

<sup>2</sup> Styled by Bentham, in the *Introduction to the Principles of Morals and Legislation*, chap. xv. (25), 'chronical punishments.' (C. M. A.)

Restrictive  
Punish-  
ments.

7. *Punishments purely Restrictive*.—Such as, without partaking of any of the preceding characteristics, consist in some restraint, some restriction, in being prevented from doing what one wishes to do. As an illustration, a prohibition from exercising a particular calling or frequenting a certain spot.

Compulsive  
Punish-  
ments.

8. *Punishments purely Compulsive*.—Such as require a man to do something from which he would rather be excused—for example, an obligation to present himself at certain fixed intervals before an officer of Justice.

The punishment does not lie in the doing of the act, but in the inconvenience of the constraint.

Pecuniary  
Punish-  
ments.

9. *Pecuniary Punishments*.—Such as consist in depriving the culprit of a sum of money, or of some tangible article of property.

Quasi-  
pecuniary  
Punish-  
ments.

10. *Quasi-Pecuniary Punishments*.—Such as consist in depriving the culprit of a species of property which he enjoys in the shape of the services of individuals; either services pure and simple, or services associated with some form of pecuniary profit.

Character-  
istic Pun-  
ishments.

11. *Characteristic Punishments*.—Such punishments as, by means of some analogy, are designed to represent the idea of the offence to the imagination in a vivid manner. These punishments do not properly constitute a distinct and separate class; they are really included in the others—ignominious, penitential, afflictive, etc. Characteristic punishment simply consists in coupling the mode of infliction with some circumstance that has relation to the nature of the crime. Suppose that coiners of base money, instead of being punished by death,<sup>1</sup> were condemned to

<sup>1</sup> Counterfeiting the gold and silver coin of the realm was made treason by 25 Edw. III., c. 2. Coining remained a capital offence until the year 1832. Writing of this offence, Macaulay said: 'It was to no purpose that the rigorous laws against coining and clipping were rigorously executed. . . . One morning seven men were hanged and a woman burned for clipping. But all was vain. The gains were such as to lawless spirits seemed more than proportioned to the risks' (*History of England*, chap. xxi.). Cf. *ante*, vol. ii., p. 129, note. (C. M. A.)

other punishments, and amongst them to indelible branding. If the words 'coiner of base money' were branded on the culprit's brow, while either cheek bore the impress of a piece of current coin, that punishment, recalling the crime by a sensible image, would be eminently characteristic. So, too, as part of the punishment for stealing children from their parents, one might introduce a characteristic penance by hanging from the culprit's neck the hollow effigy of a child, life-size and cased in lead. The interior might be loaded with weights at the discretion of the Judge, and in a degree suited to the strength of the criminal.

In a house of correction, the delinquents, according to the character of the various offences of which they have been convicted, should be forced to wear emblematical garments, or to bear other external marks suggestive of striking analogy. In this way, the perception of their crime would never be wholly absent from the mind; their mere presence would serve as a fresh proclamation of the law against which they had offended; and the hope of escaping this disgrace by resuming ordinary clothes would be a powerful inducement to them to conform with official regulations.

## CHAPTER XL.

### JUSTIFICATION OF VARIETY IN PUNISHMENTS.

'Et quoniam variant morbi, variabimus artes;  
Mille mali species, mille salutis erunt.'

WE have already seen that the choice of punishments involves a host of considerations; that they ought to be susceptible of being rendered greater or less, and of being made equal by adjustment to the particular surroundings: that they ought to be commensurable, analogous to the offence, exemplary, economical, reformative, popular, etc. We have seen, too, that no single punishment could ever possess all these attributes, that it is necessary to combine, vary, and assort them, so as to arrive at the amalgam of which we are now in search.

A Code has  
already  
been pre-  
pared.

If a code based on these principles were a mere project, it might, perhaps, be regarded as some fine-spun speculation impossible of realization. Those cold dispassionate men who are ever full of despairing incredulity wherever the happiness of mankind is concerned would not fail to indulge in the trite reproach of impracticability, so convenient for idleness and so comforting to self-love. But the work has been done, the plan is already executed, a penal code has been constructed on these principles;<sup>1</sup> and this code, subservient as it is to all these rules, is marked in a peculiar degree by its lucidity, its simplicity, and its precision. Every single specimen of penal legislation hitherto

<sup>1</sup> Cf., e.g., *General View of a Complete Code*, Bowring, vol. iii., p. 157. Bentham had been working on the Penal Code for many years, but it was never actually completed. (C. M. A.)

enacted, without having achieved one half of the object in view, is throughout infinitely more vague, perplexing, and obscure than this code.

It has been found necessary to seek great variety in the forms of punishment, so as to adapt them to the different offences, and to devise new expedients for rendering them exemplary and characteristic. But the very persons who will most readily agree that, as a general proposition, these two attributes are essential, will probably revolt against any attempt to apply them to punishments which are to be actually inflicted. Punishments naturally excite antipathy—nay, even horror—when considered apart from the offences to which they relate. Moreover, when the question turns on sentiment and the imagination, opinions are so fluctuating and so largely matter of caprice that the very punishment which will arouse the indignation of one man as being too severe will be censured by another as being too lenient and of little or no efficacy.

I wish at this stage merely to anticipate an objection. Let it not be supposed that a penal system must necessarily be cruel because the punishments are varied. The multiplicity and the variety of punishments display care and industry on the part of the legislator; to have only one or two kinds of punishment is a result of ignorance of principles and of a barbarous disregard for proportion. I might cite instances of States, where despotism is rampant and civilization is in a backward condition, in which it may be said that but one form of punishment is known. The more we study the multiform nature of offences and of motives, as well as the great diversity in character and circumstances, the more clearly shall we recognize the necessity for making use of different expedients to meet the exigencies of different cases.

Penal system with variety of punishments not necessarily cruel.

Offences—those internal enemies of society who wage against it, with varying success, a stubborn and ruthless warfare—combine all the mischievous propensities of

noxious animals; some employ violence, while others have recourse to stratagem and wiles. They know how to assume an infinite variety of shapes, and yet everywhere maintain unperceived a secret correspondence. If we have fought them without reducing them to submission, if, indeed, the revolt is as active as ever, we must ascribe our failure in the main to the imperfection of legal tactics and to the clumsiness of the weapons we have hitherto made use of against them. Assuredly, we need quite as much wit, prudence, and foresight, to defend society as to attack it—to prevent crime as to commit it.

Punishment of offences against property contrasted with that of offences against the person.

If we would determine whether a given penal code is rigorous and harsh, we must note how it punishes the most common form of crime—offences against property. In this regard the laws of every country have been too severe; because, the penalties being ill-chosen and misapplied, there has been an attempt to make up in harshness what was lacking in justice. We must be less lavish of punishment when dealing with offences against property, so that we may have all the more to spend when we come to deal with offences against the person. The first class admit of the making of indemnity; while the second class do not allow of compensation in the same kind of way. The evil of offences against property may be reduced almost to insignificance by means of insurance; while not all the gold of Potosi could recall a murdered man to life, or allay the terror aroused by such a crime as murder. But the question is not whether a penal code be more or less severe; that is a mistaken way of approaching the subject. The only point to consider is whether or not the severity of the code is necessary.

A Code may be cruel owing to the lenity of the punishments imposed.

It is cruel to expose even the guilty to useless suffering; and that would be a result of unnecessarily harsh penalties. But is it not more cruel still to allow the innocent to suffer? And yet that is the result of penalties too mild to prove efficacious.

We may, then, conclude that variety in punishments is one of the perfections of a penal code; and the more repellent the quest for such expedients is to a sensitive soul, the more necessary is it that the legislator should be so imbued with humanity as to be able to gain, in this regard, a victory over himself. Was Sangrado, who prescribed no remedy other than bleeding, more humane than Boerhaave, who ransacked the world of nature in search of fresh remedies ?<sup>1</sup>

<sup>1</sup> The subjects treated in this chapter are dealt with at length in the 'Rationale of Punishment,' taken from Dumont's *Théorie des Peines* (Bowring, vol. i., pp. 388-523). Herman Boerhaave (1668-1738) was one of the most famous physicians of the eighteenth century. He was born near Leyden, and was long Rector of the University in that town. (C. M. A.)

## CHAPTER XLI.

### EXAMINATION OF CERTAIN PUNISHMENTS IN COMMON USE.

Afflictive  
Punish-  
ments.

**AFFLICTIVE PUNISHMENTS.**—Such punishments are not suited to every form of offence, because they cannot be reduced to an extremely slight degree of severity—at any rate, in the case of persons who do not belong to the very lowest orders of the community. Every corporal punishment inflicted publicly is infamous; if inflicted in private, it would still be infamous, but it would no longer be exemplary.

The  
'lash.'

The commonest afflictive punishment is the lash. As usually applied, this punishment has the inconvenience of not being 'equal to itself.'<sup>1</sup> It may vary from very slight pain to the most barbarous torture—nay, even to death itself. Everything depends upon the nature of the instrument used for flogging, the vigour with which it is applied, and the temperament of the culprit. The legislator who ordains it does not know what he is doing, and the judge is very little better off; in execution, it must always remain a punishment arbitrary in the highest degree. The lash is used in England in the case of larceny where juries, by a merciful miscarriage, have fixed the value of the stolen property as being less than one shilling.<sup>2</sup> This punish-

<sup>1</sup> Cf. *ante*, vol. ii., p. 143. *I.e.*, such that its severity may be uniform when it is applied to different classes of offenders. (C. M. A.)

<sup>2</sup> Under the ancient Saxon laws, theft was punishable by death if the value exceeded twelve pence (then, probably, equal to about 13s. 4d.); but the criminal might redeem his life by a pecuniary ransom. In the reign of Henry I. the power of redemption was taken away, and offenders were directed to be hanged; and (subject to certain provisions as to benefit of clergy, imprisonment, and transportation) the law so continued when Bentham wrote. Petty larceny under twelve pence, though a felony, was punishable, at common law, by imprisonment or whipping. (C. M. A.)

ment proves a source of revenue to the executioner; and, if the culprit suffers much, it can only be because he has not had the means to make a convenient arrangement with that official.<sup>1</sup>

INDELIBLE PUNISHMENTS.—Considered separately, afflictive punishments, when indelible, are not susceptible of graduation. The mildest of them, if inflicted at all, must be inflicted in a severe form. Some—as, for example, branding—merely disfigure the person; others involve a loss of the use of the limbs; others, again, consist of mutilations, and cause the loss of the nose, the ears, the hands, the feet, and so on.

Mutilations of the organs that are used in labour ought not to be applied in the case of common offences, such as those which proceed from poverty—*e.g.*, larceny, smuggling, etc. What can we do with the culprits when we have maimed them? If the State maintains them, the penalty becomes too expensive; if we leave them to their fate, we condemn them to despair and death.<sup>2</sup> Penal mutilations are subject to two inconveniences—the one is that the punishment cannot be remitted, the other is that it is apt to be confounded with the result of some natural accident. So far as appearance goes, there is no difference between a man who has had his arm cut off for a crime and the man who has lost an arm in the service of his country. It would therefore be necessary in every case to add some obviously artificial brand, which would serve at once as an indication of the crime and as a protection for any unfor-

<sup>1</sup> Cowper, describing this form of punishment, wrote: ‘Being convicted, he was ordered to be whipt, which operation he underwent at the cart’s tail. . . . He seemed to shew great fortitude, but it was all an imposition upon the public. The beadle, who performed it, had filled his left hand with red ochre, through which, after every stroke, he drew the lash of his whip, leaving the appearance of a wound upon the skin, but in reality not hurting him at all’ (letter to Rev. J. Newton, November 17, 1783). (C. M. A.)

<sup>2</sup> When Bentham wrote, a few crimes still involved mutilation or dismembering, by cutting off the hand or ears; while other forms of punishment fixed a stigma on the offender, by slitting the nostrils or on the hand or cheek. (C. M. A.)

Indelible  
Punish-  
ments—  
could.

fortunate man similarly maimed. These punishments might, I think, be suppressed altogether; or they might, at any rate, be reserved for a few very rare offences, in the case of which they may be deemed advisable as analogous penalties.

Indelible branding is a most effective expedient, but it is one of which an ill use has been made. Among offenders convicted of larceny and of receiving stolen goods, many have only yielded to a momentary temptation, and might well return to the paths of virtue if the punishment be not of such a nature as to debase and degrade them. In such cases there should be no indelible brand, no infamous penalty: for that would be to deprive them of the hope of regaining their good name and redeeming the error of a moment. But suppose, for example, that we stamp an indelible mark on the coiner of base money, it then serves as a signal and warning to those who have dealings with such offender, without depriving him of his means of livelihood. Though despised as rascals, convicts of this type might still find employment as skilled workmen. But when a man is branded for a first offence of larceny, what is to become of him? Who would be willing to engage him? How would honesty advantage him? We have made crime almost a necessity to him.

An indelible brand is only useful either to proclaim an offender who, though dangerous, ceases to be so when it is known who and what he is, or for the purpose of securing the fulfilment of some other punishment. Thus when the crime is infamous, branding should attend perpetual imprisonment, so as to prevent the escape of the prisoner. It binds him, as it were, with links of iron, for the gaol becomes an asylum to him, and he would be worse off outside than within its walls. To render such marks at all times distinguishable, they should be made by the use of coloured powders, and not by means of burning.

IGNOMINIOUS PUNISHMENTS.—*Infamy* is one of the most salutary drugs in the penal pharmacopœia;<sup>1</sup> but the ideas prevalent on this subject are much confused, and the expedients employed are very imperfect. According to the notions of lawyers, it would seem that infamy is something homogeneous and indivisible, an absolute and invariable quantity. If that were really so, the use of this punishment would be almost always unwise and unjust; for it is applied in the same way to offences varying greatly in gravity, and even to certain offences which ought not in any case to involve its use. Infamy, properly managed, is indeed susceptible of graduation in a very high degree. It is in morals what uncleanness is in the natural world: to have a dirty spot on one's clothes is a very different thing from being covered with mud.

Ignominious Punishments. Punishment of Infamy; or, Forfeiture of Reputation.

*Loss of Honour* is another trite and not less misleading phrase. It involves two false assumptions—first, that honour is a sort of property, with a certain amount of which everyone is provided; and, secondly, that it is entirely at the disposal of the law, and can be taken away as the law pleases. The term *dishonour*, which does not, like the word 'infamy' exclude the conception of varying degrees, would seem to be more appropriate; it signifies a burden which may press upon one more or less heavily according to circumstances.

Loss of Honour.

Infamy, as the word is used in ordinary parlance, bears rather upon the criminal than upon the crime; it is, so to speak, legislation turned topsy-turvy. But, if infamy had relation to the crime itself, its effect would be more certain, durable, and efficacious; it might then be proportioned to the nature of the particular offence. Now, how could that end be attained? We must

<sup>1</sup> Cf. Hazlitt's *Spirit of the Age*, 'Jeremy Bentham': 'A man may be callous and indifferent to what happens to himself; but he is never indifferent to public opinion, or proof against open scorn and infamy. Shame, then, not fear, is the sheet-anchor of the law. . . . Everyone makes a sorry figure in the pillory.' (C. M. A.)

needs devise for every kind of crime a special kind of dishonour.

Criminal  
might be  
surrounded  
by Symbols  
of his  
Crime.

But all this could only be carried out by the introduction of a new legal mechanism: inscriptions, emblems, garments, pictorial representations of every crime—in a word, signs which appeal to the eyes, strike the imagination through the senses, and give rise to the intimate association of disgrace with the particular offence in question. It is thus that public indignation, which is but too apt to be directed against the laws and the judiciary, might be concentrated upon the crime and the criminal. Let us not disdain to borrow from the stage modes of representations that impress the imagination. No; if we surround the criminal with symbols of his crime, it will not be a foolish display of power and authority, a laughable burlesque: it will rather be an instructive scene, proclaiming the moral object of punishment, and rendering the laws more worthy of respect by exhibiting them, while engaged in the discharge of a painful function, as more concerned to teach a great lesson than to gratify the spirit of vengeance.

The  
Pillory.

The *pillory* in England is, of all penalties, the most unequal and ill-enforced.<sup>1</sup> The culprit is abandoned to the caprice of the mob. How can we describe so fantastic a form of punishment? Now it is a veritable triumph for the criminal, and anon it means death to him. Some years ago a literary man was condemned to the pillory for what the judges called a 'libel.' The platform on which he was placed became a kind of lyceum, and the whole performance consisted of complimentary passages between himself and the spectators. In 1760 a bookseller was put in the pillory for having sold some impious or seditious work.

<sup>1</sup> The pillory had gradually fallen into disuse, and was abolished by statute of June 30, 1837. But it was resorted to in certain cases. When Bentham wrote, a bankrupt was required, under pain of death, to appear to his commission and make full discovery of his estate. Unless it appeared that his difficulties clearly arose from some casual loss, he was liable to be put in the pillory for two hours, after which time one of his ears might be nailed to the pillory and cut off. (*Cf. ante*, vol. ii., p. 148). (C. M. A.)

A subscription opened for him during the execution of the punishment brought him in more than one hundred guineas. What an affront to the laws ! More recently a man condemned to the same fate for an odious offence was slain by the mob under the very eyes of the police, who made no effort to protect him. Mr. Burke had the spirit to denounce this outrage in the House of Commons. 'The man,' said he, 'who is undergoing a punishment is under the protection of the laws, and ought not to be given up as a prey to wild beasts.' The orator was applauded, but the abuse continued; and yet a mere iron grating fixed around the stake would have prevented any such act of barbarity.

CHRONICAL PUNISHMENTS. — Punishments dependent upon lapse of time, such as exile and imprisonment, are well fitted to many offences; but they require that peculiar attention should be given to the circumstances which influence individual sensibility. Exile would be a punishment unequal to the last degree if there were no option as to its infliction. Its severity depends on the condition and fortune of the culprit. Some men feel no love for their country, while others would be in despair at the thought of quitting their home and their estates. Some men have families, while others are wholly independent of such ties. One man would be deprived of all the resources of livelihood; another would merely find a means of escape from his creditors. So, too, age and sex make a vast difference. Much latitude, then, must be left to the judge, the legislator confining himself to general instructions.

Before America secured its independence, the English were in the habit of transporting a numerous class of delinquents to the colonies. For some this deportation amounted to slavery; to others it meant joining a pleasure-party. A miscreant who had a mind to travel was nothing short of a fool if he did not commit some crime, and so

Chronical  
Punish-  
ments.

Transpor-  
tation.

Transportation—  
contd.

procure for himself a free passage.<sup>1</sup> The more industrious of the convicts succeeded in establishing themselves in the new countries; while those who only knew how to steal, not finding much opportunity of exercising their skill in a land quite strange to them, soon ended their days on the gallows. Once condemned and deported, their fate was unknown; and if they perished from poverty or disease, nobody knew and nobody cared. Thus all the good effect of example was lost, and the principal end and aim of punishment was wholly neglected. The transportation to Botany Bay which is now in vogue does not answer the purpose any better.<sup>2</sup> It has all the defects that a punishment can have, and not one of the attributes that it ought to possess.

If, while offering an establishment in a distant land, one were to add to the offer a condition that the benefit should be secured by the commission of crime, what an absurdity! what a crazy idea! Yet transportation must present itself to the mind of many an unfortunate wretch as an advantageous arrangement of which he can only avail himself by indulging in some violation of the law. Thus the law, instead of countervailing the temptation to crime, in very many cases gives it additional strength.

Prisons.

As to the use of *prisons*, it is impossible to express any definite opinion until we have determined with the utmost exactitude everything relating to their structure and in-

<sup>1</sup> Banishment is said to have been first introduced as a punishment by 39 Eliz., c. 4, which provided for the deportation of such rogues as were dangerous to the inferior people. Transportation was brought into general use by 4 Geo. I., c. 11, whereby the Court was given a discretionary power to order thieves, though entitled by law to their Clergy, to be transported to the American plantations. The persons contracting for his conveyance had an interest in the services of the convict for seven or fourteen years, according to the term of transportation. (C. M. A.)

<sup>2</sup> After intercourse with America ceased, the system of the Hulks was adopted, and the plan of transportation was but little resorted to. There was, it seems, great difficulty in finding any place where the services of convicts could be rendered profitable to merchants who would undertake to transport them. Hence arose the notion of creating an establishment on the eastern coast of New South Wales, the convicts being landed in Botany Bay (see 27 Geo. III., c. 2). (C. M. A.)

ternal government.<sup>1</sup> With the exception of a small number, all our gaols contain every imaginable contrivance for the corruption of body and soul alike. If we consider them merely from the point of view of the complete idleness of the prisoners, these penal institutions are costly beyond all reason.<sup>2</sup> The faculties of the inmates become, by constant disuse, feeble and inert; their limbs are deprived of suppleness and elasticity; stript at the same time of honour and of habits of labour, they leave the gaol only to find themselves driven once more into crime by the goad of starvation. Subject to the despotic rule of the lower class of officials—men for the most part depraved by the sight of crime and the practice of oppression—these unhappy creatures may be abandoned to a thousand unknown woes, which embitter them against society and inure them to every form of punishment.

Prisons -  
cond.

In its moral aspect, the prison must be regarded as a school in which vice is taught by means more sure than any we should ever be able to employ for the inculcation of virtue. Boredom, revenge, and penury, preside over this perverse education: the only ambition is to excel in crime. Everything tends towards the level of the vilest of the crew: the most ferocious inspires his fellows with

<sup>1</sup> See the details of Bentham's 'Panopticon' scheme; Bowring, vol. iv., p. 67. (C. M. A.)

<sup>2</sup> By 16 Geo. III., c. 43, county justices had been empowered to prepare houses of correction for the reception of convicts under sentence of death to whom the King should extend his mercy, to be kept at hard labour for a term not exceeding ten years. Such as refused work were to be subject to corporal punishment; while those who behaved well had the prospect of their period of detention being shortened, and on their discharge were to receive clothes and a substantial sum of money. The Act had, however, little immediate practical effect. John Howard's book on the *State of Prisons* was published in 1777; and in 1778 Bentham published a pamphlet entitled *View of the Hard Labour Bill* (Bowring, vol. iv., p. 1), exhibiting a special application of the cardinal principles of his theory of punishments to the organization of a regular penitentiary system. Eden's Bill became an Act in 1779 (19 Geo. III., c. 74), and provided for the erection of two penitentiaries over which it was intended that Howard should have supervision. A site was chosen at Battersea, but the Act was never carried out, and the failure of this scheme led to Bentham's famous 'Panopticon' project. (C. M. A.)

his ferocity, the most artful imparts to them his cunning, the most profligate his licentiousness. Whatsoever goes to defile the heart or the imagination is welcomed as the means to drive away despair. United by common interest, the prisoners join together in efforts to throw off their yoke of shame. Upon the ruins of social honour is built up a new type of honour, compounded of falsehood, a reckless disregard of infamy, heedlessness of the future, hatred of the human race; and thus it is that unfortunate wretches, who might have been restored to virtue and happiness, attain to the heroism of crime, to the sublime heights of villainy.

Necessity  
for dealing  
with dis-  
charged  
Prisoners.

A criminal, on completing his term of imprisonment, ought not to be let loose on society without probationary tests and precautions. To transfer him all at once from a state of surveillance and captivity to unconditioned liberty, to abandon him to all the temptations of poverty and loneliness, and of desires sharpened by long privation, is a thoughtless and inhuman proceeding, such as ought at last to attract the attention of legislators. What happens when the inmates of the hulks on the Thames are released? <sup>1</sup> When that Jubilee of Crime occurs, the malefactors pour into the city like wolves who, after a long fast, find themselves in a sheepfold; and, until all these marauders have been rearrested for fresh offences, there is no safety on the highroads, nor, indeed, at night-time in the streets of the metropolis itself.

Pecuniary  
Penalties.

PECUNIARY PENALTIES.—These punishments enjoy the threefold advantage of being susceptible of graduation, of fulfilling the object to be attained, and of serving as an indemnity to the party injured. But it must be remem-

<sup>1</sup> In 1812 Mr. Justice Chambre told Romilly that the judges frequently sentenced men to long terms of transportation merely to prevent their detention in the hulks. It was, said he, very usual, where the prisoner was sentenced only to seven years' transportation, not to transport him at all, but to keep him for the whole term on board the hulks—a form of punishment which, according to Mr. Justice Bailey, left the prisoner much worse than it found him (*cf. Romilly's Memoirs*, iii. 71). (C. M. A.)

bered that if the amount be absolutely fixed, a pecuniary penalty is in the last degree unequal. Although this remark is so obviously true, the circumstance has, nevertheless, been constantly neglected by legislators. Fines have been assessed without any regard to the profit derived from the offence, to the loss occasioned by it, or to the means of the delinquent. A penalty might be trifling if imposed on one man, and yet ruinous to another. One recalls the incident of the insolent Roman youth, who cuffed the passers-by and forthwith presented each one with a crown, the fine fixed by the law of the Twelve Tables.<sup>1</sup> If we are minded to establish a pecuniary penalty, the amount must be regulated by the fortune of the culprit—that is to say, the amount must be fixed relatively, and not absolutely. For such and such an offence, such a fraction of the offender's property; but this, again, must be subject to certain reservations and modifications, so as to obviate the difficulties that might attend a strict and literal adherence to the regulation.

PUNISHMENTS PURELY RESTRICTIVE.—There is nothing in penal legislation more ingenious than *banishment from the presence* of the injured party. This punishment is suggested by the ancient laws of France, and some trace of it is to be found in the Danish Code. With certain improvements, it would afford an excellent remedy for offences arising out of private feuds from which the general public have nothing to fear. It secures a triumph for the oppressed over the oppressor, and restores in the most pleasing fashion the supremacy of injured innocence over tyrannical strength. Besides, it prevents the renewal of the quarrel, and deprives the aggressor of the opportunity of doing further wrong. But, to put in operation an expedient so closely associated with honour, we must needs pay most scrupulous regard to the special situation of the individuals concerned.

Punishments purely restrictive.

<sup>1</sup> Aulus Gellius tells this story of Lucius Neratius. (C. M. A.)

Capital  
Punish-  
ment.

CAPITAL PUNISHMENT.<sup>1</sup>—The more attention one gives to the considerations bearing upon the death penalty, the more one is led to adopt the view of Beccaria. The subject is so fully discussed in his work,<sup>2</sup> that we may well dispense with treating it anew. Those who wish to see at a glance all that can be said *pro* and *con* need merely read over the table setting forth the attributes we should seek for in punishments (see *ante*, vol. ii., p. 143 *et seq.*).

What can be the origin of the rage for awarding this punishment with such a lavish hand? It results from the spirit of resentment, which at first inclines to the utmost rigour, and from a certain indolence of mind, which sees in the prompt destruction of criminals the great advantage of having no further occasion to concern oneself about them.<sup>3</sup> Death—always death! That decree demands neither careful study nor resistance to the passions; we have but to yield to their sway, and we are led to the goal in a single stride.

It may be said that the death of an assassin is necessary to deprive him of the power of repeating his crime; but ought we not, then, by parity of reasoning, to destroy mad

<sup>1</sup> This question is discussed in detail in the 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*, book ii., chap. xii.; Bowring, vol. i., p. 444). (C. M. A.)

<sup>2</sup> *Des Délits et des Peines*. § xvi. (C. M. A.)

<sup>3</sup> Wilkes told Romilly that 'he thought the happiest results followed from the severity of our penal law. It accustomed men to a contempt of death, though it never held out to them any very cruel spectacle; and he thought that much of the courage of Englishmen, of their humanity, too, might be traced to the nature of our capital punishments, and to their being so often exhibited to the people.' Another view was presented to Romilly one evening in June, 1808, after the introduction of his Bill to abolish the death penalty for pocket-picking. He was standing at the bar of the House, when a young man, the brother of a peer, came up to him, and, breathing in his face the nauseous fumes of an undigested debauch, stammered out: 'I am against your Bill; I am for hanging all.' Romilly was confounded, sought to find some excuse for him, and observed that he supposed the young man meant that, as the certainty of punishment afforded the only prospect of suppressing crimes, the laws, whatever they were, ought to be enforced. 'No, no!' was the reply; 'it is not that. There is no good done by mercy; they only get worse. I would hang them all up at once' (Romilly's *Memoirs*, vol. i., p. 84, etc.). (C. M. A.)

and frantic persons from whom society has everything to fear? If we can protect ourselves from raving lunatics, why not from assassins? Or it may be said that death is the only punishment which will prevail over certain temptations to the commission of homicide; but such temptations can only arise from hatred or greed; and are not those passions, by their very nature, more likely to stand in fear of humiliation, want, and captivity, than of mere loss of life?

The reader would be astounded if I were to lay open to his view the penal code of a nation celebrated for its enlightenment and humanity. He would expect to discover the most exact proportion between crimes and punishments; but he would find, in fact, that the proportion is constantly ignored or violated, while the punishment of death is lavished upon quite trifling offences. What is the consequence? The mildness of the national character being in conflict with the laws, it is the customs and feelings of the people that prevail, and the laws are evaded.<sup>1</sup> Pardons are granted broadcast; men shut their eyes to crime, or throw difficulties in the way of proof; while juries, to escape an excess of severity, often fall into excess of indulgence. Thence there results a system of penal law, incoherent, contradictory, combining harshness with weakness, dependent on the temper of the judge, varying from circuit to circuit, now bloodthirsty, and anon wholly impotent.

English lawgivers have not yet employed that kind of

<sup>1</sup> Cf. Montesquieu, *Esprit des Lois*, vi. (13); Beccaria, chap. xxvii.; and Voltaire, *Prix de la Justice et de l'Humanité*, 1777, art. 2 (du Vol), cited Halévy, i. 320: 'Il est singulier que l'Angleterre, où les premiers de la nation sont si éclairés, laisse subsister une si grande quantité de lois absurdes. Elles ne sont pas exécutées, il est vrai; mais elles forcent la nation à laisser à la puissance exécutive le droit de modifier ou d'enfreindre la loi.' Judges and jurors alike rebelled against a rigorous enforcement of the law. Between 1803 and 1810 great numbers of prisoners were found not guilty and discharged; while, though no less than 1,872 persons were sentenced to death for petty thefts and divers small offences against property, one only of the sentences was, in fact, executed (cf. *ante*, vol. ii., p. 158, note). (C. M. A.)

Position as  
to Capital  
Punish-  
ment in  
England.

Imprison-  
ment with  
hard labour.

punishment which from many points of view is so excellent—imprisonment conjoined with labour. Instead of compulsory occupation, they have reduced prisoners to absolute idleness. Is this by deliberate design? No, doubtless, from mere force of habit. They have found matters proceeding on this footing, and, though they disapprove, they make no change. To reconcile detention with labour would need improvements, vigilance, and sustained attention. Nothing of the kind is needed to lock a man up and leave him to himself.<sup>1</sup>

<sup>1</sup> See Bentham's pamphlet entitled *View of the Hard Labour Bill*, published in 1778, the year after the appearance of John Howard's work on the *State of Prisons* (Bowring, vol. iv., p. 1). Cf. *ante*, vol. ii., p. 165, note. (C. M. A.)

## CHAPTER XLII.

### CONCERNING THE POWER TO PARDON.

WHAT punishment lacks in point of certainty must be made up in severity. The less certain penalties are, the more severe must they be; the more certain they are, the less severe need they be.<sup>1</sup>

What is lacking in certainty must be made up in severity.

What, then, shall we say of a power created for the very purpose of rendering them uncertain? Such, however, is the direct consequence of the power to pardon.

The power to pardon.

In the race, as in the individual, the age of passion precedes that of reason; the earliest penal laws were prompted by anger and a spirit of revenge. But when these rude laws, based upon antipathy and caprice, begin to shock an enlightened public, the power of pardoning, offering protection against the harshness of the laws, becomes, so to speak, a comparative good; and no one looks into the matter to see whether this seeming remedy is not, in truth, a new evil.

What eulogies have been lavished upon clemency! It has been reiterated a thousand times that it is the cardinal virtue of a Sovereign. No doubt, if the offence is merely an attack on his *amour-propre*, if it be a mere question of some satire upon the Prince or his favourites, moderation on his part is deserving of all praise, and the pardon that he accords is a triumph gained over himself; but when we are concerned with a crime against society, the pardon is no longer an act of clemency—it becomes a veritable betrayal of trust.

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. xiv. (¶ 6, 18); and 'Rationale of Punishment' (taken from Dumont's *Théorie des Peines*, book vi., chap. iv.; Bowring, vol. i., p. 520). (C. M. A.)

In cases where punishment would do more harm than good, as in certain cases of sedition, conspiracy, or scenes of public disorder, the power of pardoning is not merely useful—it is really necessary. Such cases being anticipated and expressly provided for in a good legislative system, the pardon, when applied, would be an execution rather than a violation of the laws. But as for motiveless pardons, resulting from the favour or the easy temper of the Sovereign, they condemn alike the laws and the government: the laws, of cruelty to individuals; the government, of cruelty to the public. Reason, justice, and humanity, must be all at fault: for Reason is never in conflict with herself; Justice cannot destroy with one hand what she has created with the other; and Humanity will hardly prescribe punishments for the protection of innocence, and at the same time decree the grant of pardons for the encouragement of crime.

The royal prerogative.

The power of pardoning is, we have been told, the noblest prerogative of the monarch—one of the brightest jewels in the royal crown. But may not that prerogative sometimes prove a burden in the hands which exercise it? If, instead of gaining for the Prince more steadfast affection from his people, it exposes him to caprices of judgment, to clamour, and to libellous attacks; if he can neither grant petitions without being suspected of weakness, nor prove unyielding without being charged with harshness, wherein lies the great excellence of this dangerous privilege? It seems to me that a just and humane Sovereign must often regret being exposed to such a conflict between public and private virtues.

Homicide should, at any rate, be always treated as an exception. The man who enjoys a right to pardon that crime is master of the life of every citizen.<sup>1</sup>

<sup>1</sup> Cf. Bowring, vol. i., p. 520. In his introduction to the second volume of the *Traité*, Dumont explains that it would suffice to prevent any abuse of the power of pardoning if there were an obligation to accompany its exercise by a clear exposition of the grounds for showing

We thus see that, if the laws are too severe, the right of granting a pardon is a useful corrective; but this corrective is in itself an evil. Make good laws, and there will be no need for a magic wand that possesses the power of annulment. If the punishment be necessary, it ought not to be remitted; if it be unnecessary, it should never be imposed.

clemency. And, especially where capital punishment is in vogue, it would be better to retain the power of pardoning, even in its absolute form and without conditions, rather than to suppress it altogether. Many years after the publication of the *Traité*s Bentham dealt with the subject of 'pardons' in an address to 'His Fellow Citizens of France' on the *Death Punishment*. It was dated December 17, 1830 (see Bowring, vol. i., p. 528). (C. M. A.)

## PART IV.

### INDIRECT MEANS OF PREVENTING OFFENCES.<sup>1</sup>

#### INTRODUCTION.

Distinction  
between  
direct and  
indirect  
Legisla-  
tion.

IN all sciences, there are some branches which have been cultivated more slowly than others, because they have demanded a longer course of observations and deeper reflection. In this way, mathematics has a higher or transcendental part, which is, so to speak, a new science over and above the ordinary science.<sup>2</sup>

Up to a certain point, the same distinction may be applied to the art of legislation. Some actions are harmful. What, then, should be done to prevent them? The first answer which suggests itself to everybody is this: 'Forbid such actions: punish them.' This mode of combating offences being the simplest and the first to be adopted, every other plan for attaining the same end is a refinement of the art, and, so to speak, its transcendental branch.

The function of that branch is, therefore, to devise a series of legislative edicts so framed as to prevent offences by acting mainly on the inclinations of individuals, in order to turn them from evil ways and direct them along the road most advantageous to themselves and most conducive to the happiness of their fellows.

The first method—that of combating offences by *punish-*

<sup>1</sup> Cf. Bowring, vol. i., p. 533. (C. M. A.)

<sup>2</sup> *Quare*: 'The fact that all mathematics is Symbolic Logic is one of the greatest discoveries of our age. . . . Symbolic Logic is the study of the various general types of deduction' (Hon. B. Russell, in 1903). (C. M. A.)

*ments*—constitutes *direct* legislation. The second method—that of combating offences by *preventive means*—constitutes a branch of legislation which I style *indirect*.

Thus, the Sovereign acts *directly* against offences when he prohibits them severally, each one under a special penalty: he acts *indirectly* when he takes precautions to prevent their occurrence. Direct legislation assails the mischief by means of a frontal attack; indirect legislation has recourse to oblique methods. In the first case the legislator openly declares war against the enemy, announces his approach, pursues the foe, fights him hand to hand, and scales his batteries in broad day. In the second case he does not make known his plans. He lays mines, sets spies to work, seeks to frustrate the designs of the enemy, and to secure an alliance with those who might otherwise have harboured hostile intentions.

Political speculators have had a glimpse of all this; but in treating of the second branch of legislation they have failed to convey any clear idea of it. The first branch was reduced to a system long ago: the second has never been analyzed; no one has ever thought of dealing with it methodically, of classifying it—in a word, of considering it as a whole. It is still a new subject.

Attitude of  
politicians.

Writers who indulge in political romances tolerate direct legislation as a necessary evil. While they will allow it in the last resort, they never speak of it with a very lively interest. But it is otherwise when they come to dilate upon the means of preventing offences, of making men better, of improving their mode of life. Imagination then kindles, lively hopes are raised, and we might well suppose that they were on the point of achieving the great task, and that the human race was about to assume a new shape. All this is because we have a more magnificent notion of objects in proportion as they are less familiar; while the imagination soars at large amidst vague schemes which have never yet been subjected to the restraints of analysis,

*Major e longinquo reverentia.*<sup>1</sup> The saying is as applicable to ideas as to persons. A detailed examination will reduce all these indefinite aspirations to dimensions that lie within the range of the possible; and if during this process we are bereft of some imaginary treasures, we shall be well compensated by the assurance of our hold on the actual possessions that remain.

Principles  
of System  
of direct  
Legisla-  
tion.

In order clearly to grasp what appertains to these two branches, we must begin by forming a just idea of direct legislation, which proceeds, or at any rate ought to proceed, on the following lines:

- (a) Determine what acts should be regarded as crimes.
- (β) Describe each offence by name, as murder, theft, etc.
- (γ) Expound the reasons for attributing to these various acts the quality of crimes—reasons which ought to be deduced from a single principle, and consequently should be consistent with each other.
- (δ) Assign an adequate punishment for each offence.
- (ε) Expound the reasons which serve to justify such punishment.

Such a penal system, though it were contrived in the best possible manner, would still be defective in many respects: (i.) The evil must necessarily exist before the remedy can be applied. The remedy consists in the application of punishment; and punishment can only be inflicted after the crime has been committed. Consequently, every fresh instance of such infliction is one proof the more that the punishment is wanting in efficiency, and does not get rid altogether of the sources of danger and alarm. (ii.) The punishment is itself an evil, although necessary for the prevention of a greater evil. Penal justice, throughout the whole course of the proceedings, must consist of a train of evils—evils arising from the threatenings and constraint of the law; evils arising from the prosecution of accused

<sup>1</sup> Cf. Tacitus, *Annals*, book iv. (23): 'Quæ ex longinquo in majus audiebantur.' (C. M. A.)

persons before we are able to distinguish the innocent from the guilty; evils attendant upon the infliction of judicial sentences; evils which, in the shape of inevitable consequences, are reflected upon the blameless relatives of the wrong-doer. (iii.) Finally, a penal system has no adequate grip upon many mischievous acts which evade justice, either by reason of their extreme frequency, or owing to the difficulty of definition, or it may be from some vicious inclination of public opinion which tends to show them indulgence.<sup>1</sup> Penal law can only operate within definite limits, and its sway extends only over palpable acts, susceptible of plain proof.

The imperfections of this penal system have led to a quest for fresh expedients to supply its deficiencies. Such expedients have for their end and aim the prevention of crime, either by keeping people in ignorance of evil, or by depriving them of the will or the power to do what is wrong. The means employed are, for the most part, connected with the art of influencing and directing the inclinations, by weakening the seducing motives which impel to evil deeds, and by strengthening such tutelary motives as make for that which is good.

Reasons  
for indirect  
Legislation.

Indirect means, then, are those which, without assuming the character of punishment, dispose a man, by their physical or moral action, to obey the laws; shield him from temptations to crime; and control him through his inclinations and his intelligence. Such indirect methods not only have a great advantage in point of lenity—they are found to succeed in many cases where direct means altogether fail of their purpose. All the modern historians

<sup>1</sup> *E.g.*, speaking of the offence of clipping coin, Macaulay says: 'The practice, pernicious as it was, did not excite in the common mind a detestation resembling that with which men regard murder, arson, robbery, even theft. The injury done by the whole body of clippers to the whole society was indeed immense; but each particular act of clipping was a trifle. To pass a half-crown after paring a pennyworth of silver from it seemed a minute, an almost imperceptible, fault' (*History of England*, chap. xxi.; edition of 1895, vol. ii., p. 543). (C. M. A.)

Indirect  
Methods—  
contd.

have remarked upon the extent to which the abuses of the Catholic Church have been diminished since the establishment of the Protestant religion. What Popes and Councils could never achieve by their decrees, a healthy rivalry effected without any difficulty. Catholics have dreaded to give an occasion of scandal which might afford matter of triumph to their enemies. Thus, this indirect method—free competition in religion—has greater power to restrain and reform them than all their positive laws.

Let us take from political economy a further illustration. Attempts have been made to lower the price of commodities, and in particular to reduce the rate of interest. It is true that a high price is an evil only by taking into account some good of which it prevents the enjoyment; but such evil as exists it is doubtless reasonable enough to seek to diminish. Now, what device has been adopted to bring this about? A host of restrictive regulations, fixed tariffs, a legal rate of interest. With what result? The regulations have been eluded, the penalties have been made more stringent, and yet the evil, instead of diminishing, has in fact increased. There is but one efficacious expedient; and that is an *indirect* one, which few governments have been wise enough to employ. It is, to allow to all merchants and capitalists absolute freedom of competition, relying upon them to maintain a mutual rivalry, to vie with each other and attract purchasers by offers of the most advantageous terms—such is the expedient. To allow free competition amounts to the same thing as conferring reward on the man who supplies the best quality of goods at the lowest price. This prompt and natural reward, which the whole crowd of rival traders cherish hopes of securing, acts with greater efficacy than some future punishment which everyone thinks he has a chance of escaping.

Classification  
neces-  
sarily arbi-  
trary.

Before entering upon a detailed exposition of these indirect methods, it is right to warn the reader that there is something arbitrary in the manner of their classification,

so that several of them might really be ranged under more than one head. To distinguish them systematically and completely, it would have been necessary to embark upon a very intricate and tiresome metaphysical analysis. It is enough for our present purpose that every indirect expedient may be classed under one or other of these heads, and that the attention of the legislator shall be directed to the principal sources whence such expedients may be derived.

I add only one more preliminary observation, but it is of essential importance. Among the various expedients about to be explained, there is none that can be recommended as peculiarly suitable to any one government in particular, and still less to all in general. The special advantage of each method, as distinguished from others, will be indicated under the particular head; but it may have relative inconveniences, impossible to foresee without a knowledge of all the circumstances. It must, therefore, be clearly understood that our object is, not to counsel the adoption of such or such a measure, but simply to bring it into view and commend it to the attention of those who are in a position to judge of its suitability.

## CHAPTER XLIII.

### METHODS OF TAKING AWAY THE PHYSICAL POWER TO DO HURT.<sup>1</sup>

'Inclina-  
tion,'  
'Know-  
ledge,'  
'Power.'

WHEN the will, the knowledge, and the power required for the performance of an act all concur, the act itself of necessity ensues. *Inclination, Knowledge, Power*—these three, then, indicate the points at which we must apply the influence of law in order to direct the conduct of mankind. These three words contain in a nutshell the sum and substance of all that can be done by legislation, direct or indirect.

'Power.'

I begin with *power*, because the methods of applying the influence of law in respect thereto are simpler and more limited; and because in those cases, wherein we can manage to take away the power to injure, everything is accomplished—success is already assured.

We may distinguish between two kinds of power: (i.) *Internal* power, which depends upon the intrinsic faculties of the individual; (ii.) *external* power, which depends upon persons and things that are outside him, and without which he cannot act.<sup>2</sup>

Internal  
power.

As to *internal* power, which depends upon the faculties of the individual, it is hardly possible to deprive a man of it with advantage. The power of doing evil is inseparable from the power of doing good. With his hands cut off, a man cannot steal, it is true; but, then, neither can he labour. Besides, such privative expedients are so drastic that,

<sup>1</sup> Cf. Bowring, vol. i., p. 534. (C. M. A.)

<sup>2</sup> (i.) Power *ab intra*; (ii.) power *ab extra* (Dumont).

speaking generally, we can only apply them to criminals after conviction. Imprisonment may be justified in certain cases of apprehended offences, but that is the only expedient of this class which can be so applied.<sup>1</sup>

The legislator will discover more expedients for the prevention of offences by directing his attention to the material objects which may be employed in their commission. There are some cases in which the power of doing harm may be taken away by getting rid of what Tacitus<sup>2</sup> calls *irritamenta malorum* — the subjects, the instruments of crime. In this matter the policy of the legislator may be likened unto that of a children's nurse. The iron bars for the windows, the guards around the fire, her care to remove sharp and dangerous implements from the hands of her charges, are measures of the same kind as forbidding the sale or manufacture of dies for minting money, of poisonous drugs, of arms easily concealed, of dice and other instruments of unlawful gaming; or forbidding the manufacture or possession of certain nets and other contrivances for snaring game.<sup>3</sup>

Mahomet, not trusting the restraint of reason, sought to put it out of men's power to misuse strong liquors; and if we take into account the climate of hot countries, where wine produces frenzy rather than stupor, we shall, perhaps, come to the conclusion that total prohibition was really a milder measure than a permission which would have been attended by the creation of a large number of offences, coupled with the numerous penalties that must have accompanied them.

<sup>1</sup> Dumont inserts a long note in the Latin tongue, suggesting that the Jewish rite of circumcision was probably directed against the commission of solitary vice. (C. M. A.)

<sup>2</sup> *Quære Tacitus.* Cf. 'Effodiuntur opes, irritamenta malorum' (Ovid. *Metam.* i. 140). (C. M. A.)

<sup>3</sup> Cf., e.g., the provisions relating to the sale of poisons contained in the Pharmacy Act, 1868, and in the Poisons and Pharmacy Act, 1908. See, too, the Indian Poisons Act, 1904 (Act No. 1 of 1904), which provides for the regulation of the possession and sale of all poisons in certain local areas, and the importation, possession, and sale, of white arsenic generally. (C. M. A.)

Illustrations.

The taxation of spirituous liquors serves, to some extent, the same purpose. In proportion as the price is raised beyond the means of the large mass of the community, people are deprived of the opportunity of yielding to the vice of intemperance.

Sumptuary laws, in so far as they prohibit the introduction of certain articles which have fallen under the jealous eye of the legislator, may be referred to this head.<sup>1</sup> It is this expedient which has rendered the laws of Sparta so famous—the precious metals were interdicted, foreigners were shut out, and travelling was not allowed.

At Geneva the wearing of diamonds was forbidden, and the number of horses a man might use was limited.<sup>2</sup> We might under this head refer to a number of English statutes relative to the use of spirituous liquors.<sup>3</sup> It is forbidden to expose them for sale in the open air: a licence to sell must be obtained at considerable cost, etc. The prohibition against opening certain places of amusement on Sunday should also be ranged under this head.<sup>4</sup>

So, too, measures for the destruction of libels, seditious writings, and obscene representations exhibited in the street, or for the prevention of their printing and publication.

In ancient times the police regulations of Paris forbade servants to wear swords, or even to carry canes or staves. This might have been simply to mark the distinction of rank, or it may have been a measure of security.

When any order of the people is oppressed by the ruling authorities, prudence suggests that they should be forbidden to carry arms. The greater wrong supplies a

<sup>1</sup> In ancient times there were many sumptuary laws in England, but they were repealed by the statute 1 Jac. I., c. 25; cf. 3 *Inst.*, 199. (C. M. A.)

<sup>2</sup> These usages are not cited as models, but merely to show under what head such laws should be ranged (Dumont).

<sup>3</sup> It is, e.g., an offence to hawk spirits (43 and 44 Vict., c. 24, s. 146), and it has long been an offence for any retailer to take any pledge as security for money due for the purchase of such liquors (24 Geo. II., c. 40, s. 12). (C. M. A.)

<sup>4</sup> Cf. the statute 21 Geo. III., c. 49. (C. M. A.)

ground of justification for the lesser. The Philistines compelled the Jews to repair to them whenever they had occasion to sharpen their hatchets and saws. In China the manufacture and sale of weapons is confined exclusively to the Chinese Tartars.

By a statute of George III.<sup>1</sup> a private individual is forbidden to have in his house more than fifty pounds weight of gunpowder, while traders in gunpowder are not permitted to have more than two hundred pounds weight at one time. The reason assigned is the danger arising from explosions. In the statutes relating to highways and turnpikes,<sup>2</sup> the number of horses allowed to draw a carriage is limited to eight, with an exception in favour of certain conveyances, the royal artillery, and ammunition waggons. The reason assigned is the preservation of the surface of the roads. I do not pretend to say whether these and similar measures were prompted, in any degree, by political considerations; but it is quite certain that such expedients might serve to check insurrections and to diminish the facilities for smuggling.

Among shifts of this kind, I know nothing so ingenious, and yet so simple, as that which is employed in England for placing difficulties in the way of stealing banknotes. When it is found convenient to entrust them to a common carrier or to the postal authorities, the note is cut into two parts, and each part is sent separately. The theft of one half of the note would be useless, and the difficulty of stealing the two halves one after the other is so great that the offence becomes almost impossible.

There are certain professions for the exercise of which proofs of capacity are required. There are others which

<sup>1</sup> The statute referred to is 12 Geo. III., c. 61. It was repealed by 23 and 24 Vict., c. 139, s. 1; and such matters are now regulated by the Explosives Act, 1875. (C. M. A.)

<sup>2</sup> Cf. sect. 13 of the statute 13 Geo. III., c. 84. A justice might stop a prosecution for penalties incurred by drawing with a greater number of horses than allowed, if such user appeared necessary from deep snows, &c. (*vide s.* 18). The statute was repealed in 1822. (C. M. A.)

the laws render incompatible with each other. Thus, in England, many offices of justice are incompatible with the status of an attorney. It is feared lest the right hand might be secretly at work for the benefit of the left.<sup>1</sup>

Persons who contract with the Government for the supply of stores, or for victualling the fleet, are not allowed to sit in Parliament. Such contractors might themselves be impeached and subjected to condemnation by Parliament: it would therefore be improper that they should be members of that body. But there are even stronger reasons for such exclusion, based on the danger of increasing Ministerial influence.

<sup>1</sup> In Austria a knacker is not allowed to sell meat; it is presumed that a sound animal would not have come into his hands (Sonenfels, *Police Regulations of Vienna*, 1777). A great number of police regulations may be referred to this head (Dumont). So, too, in England a person licensed to slaughter horses is subject to penalties if, while his licence is in force, he carries on the trade or business of a dealer in horses (sec 1 and 2 Geo. V., c. 27, s. 6). (C. M. A.)

## CHAPTER XLIV.

### ANOTHER INDIRECT METHOD: HINDER THE ACQUISITION OF KNOWLEDGE WHICH MEN MAY TURN TO A BAD PURPOSE.<sup>1</sup>

I MENTION this policy solely for the purpose of condemning it. It has produced the censorship of books; it has produced the Inquisition. It would, if adopted generally, produce the lasting debasement of the human race.

Hindering  
the Ac-  
quisition  
of Know-  
ledge.

I propose here to show—(a) that the diffusion of knowledge is not, on the whole, harmful, crimes of artifice and cunning being less disastrous than those due to ignorance; (β) that the most advantageous mode of combating the mischief arising from a certain limited degree of knowledge is to increase the quantity of knowledge.

In the first place I say that the diffusion of knowledge is not, on the whole, harmful. Some writers have thought, or appeared to think, that the less men know the better they will be: that the less enlightened they are, the less familiar will they be with objects that impel to evil and serve as instruments for its commission.

Benefits  
from  
Diffusion  
of Know-  
ledge.

I am not astonished that fanatics should have held such an opinion, seeing that there exists a natural and persistent rivalry between the knowledge of things real, useful, and intelligible, and the knowledge of things imaginary, useless, and unintelligible. But this trend of

<sup>1</sup> Knowledge, though commonly considered as distinct from power, is really a branch of it—a branch whose seat is in the mind. Before a man can do an act he should know two things: the motives for doing it, and the method of doing it. Thus, we can distinguish two kinds of knowledge, 'motives' and 'means.' The first constitutes 'inclination,' the latter is a factor of 'power' (Dumont).

thought as to the danger of knowledge is common enough among the mass of mankind. People speak with regret of the Golden Age—the age when nobody knew anything. To put in a clear light the misunderstanding upon which this line of thought is based, we stand in need of some more precise method of assessing the evil of an offence than any hitherto employed.

Antipathy  
versus  
Utility.

It is in no way surprising that crimes involving cunning and artifice should be more odious than crimes due to ignorance: even than some crimes of brutal violence. In judging of the magnitude of an offence, the principle of Antipathy has been followed more frequently than the principle of Utility. Antipathy looks rather to the apparent depravity of character indicated by the crime than to any other circumstance.

In the eyes of passion, this is the *salient point* of every action, and, in comparison with it, the strict scrutiny of Utility will always seem cold and calculating. Now, it is undoubtedly true that the greater the knowledge and subtlety exhibited in a crime, the greater is the deliberation displayed on the part of its author, and the greater the indication of depravity in his moral character. But the evil of the offence, which is the sole object in the eyes of Utility, is not to be determined merely by depravity of disposition. Such evil depends primarily upon the sufferings of the persons immediately affected by the crime, and upon the alarm which the crime imparts to the community at large; while into this aggregate of evil the depravity displayed by the culprit enters, it is true, but as an aggravation, and not as an essential factor. The greatest crimes are those for which the smallest degree of knowledge will suffice; the most ignorant persons always know enough to be able to commit them. Malicious flooding<sup>1</sup> is often a graver

<sup>1</sup> By statutes 6 Geo. II., c. 37, s. 5, and 10 Geo. II., c. 32, it was made felony without benefit of clergy maliciously to cut down any river or sea bank whereby lands might be overflowed. See now 24 and 25 Vict., c. 97, s. 30; and cf. note 1, *ante*, vol. ii., p. 14. (C. M. A.)

offence than arson,<sup>1</sup> arson than certain kinds of homicide, Antipathy  
homicide than robbery, robbery than picking pockets. versus  
Utility—  
could.

This proposition may be demonstrated by an arithmetical process; by preparing a catalogue of the *items* of evil on either side, by a comparison of the extent of evil inflicted on the several persons injured, and by computing the number of victims.

Now, what amount of knowledge is necessary to equip a man for the commission of such offences? The most atrocious in the whole list only requires a degree of intelligence commonly found even amongst savage and barbarous peoples.

Rape is worse than adultery or seduction; but rape is of more frequent occurrence in rude uncivilized ages, adultery and seduction in times of refinement and culture. The spread of knowledge has not increased the number of offences nor even the facilities for their commission; it has only given variety to the expedients for the perpetration of crime. And how has it given such variety? By a gradual substitution of less harmful methods in place of those which proved more injurious.

Suppose some new mode of swindling is discovered. For a time the inventor profits by his discovery; but his secret is soon found out, and then people are on their guard. Accordingly the swindler must have recourse to some fresh expedient, which has its day, and is in turn abandoned. All this is still only swindling, which is less mischievous than theft, and theft, again, is not so bad as highway robbery.<sup>2</sup> Why is this? The confidence every man

<sup>1</sup> House-burning was felony at common law, and by 9 Geo. I., c. 22, setting fire to a house was made felony without benefit of clergy. See now 24 and 25 Vict., c. 97, s. 2. (C. M. A.)

<sup>2</sup> I assume that the loss from the offence is the same. For, in one point of view, swindling may be worse than robbery, since a rascal may well secure a larger sum of money by fraud than by robbery on the public highway. For proof of the superiority of modern manners over those of ancient times, see Hume's *Essay on Population*: for proofs of their superiority over those of the Middle Ages, see Voltaire's *General History*, Hume's *History of England*, Robertson's *Introduction to*

reposes in his own wisdom and prudence prevents him from feeling so much alarm on hearing of an instance of swindling as when he is told of a case of theft.

Knowledge  
is Power.

Suppose, however, we grant that bad men make an ill use of everything, and that the more they know the greater will be their opportunities of mischief: what follows? If the good and the bad composed two distinct races, like the white and the black, we might enlighten the good while keeping the bad in a state of darkness. But, since it is impossible to draw the distinction, and as we know that good and evil constantly alternate in the same individual, there must be one law for all. General light or general darkness; there is no middle course.

The mischief we dread is, however, found to be accompanied by its remedy. Knowledge can give an advantage to the bad only in so far as it is their exclusive possession. A snare, once detected, ceases to be a snare. The most ignorant savages have known how to poison the tips of their arrows; but it is only civilized nations who are acquainted with the properties of the various poisons, and know how to counteract them by appropriate antidotes.

All men are capable of committing crimes; but it is only enlightened men who can devise laws for their prevention. The more limited a man's intelligence, the more does he incline to divorce his own private interest from the interests of his fellows. The more enlightened he is, the more clearly will he be able to see the binding ties that unite his personal interest with the interests of the community at large.

Pass in review the history of the world, and you will find that the most barbaric periods were marked by crime in all its forms, from fraud to acts of open violence. Brutish ignorance begets vice in shapes peculiar to itself; but it does

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*the History of Charles V., Barrington's Observations on English Statutes, and the treatise of the Chevalier de Chastellux on Public Happiness (a work well conceived, but only moderately executed) (Dumont). Dumont seems to refer to Hume's Essay on the Populousness of Ancient Nations (Essays, edition of 1793, vol. i., p. 370). (C. M. A.)*

not exclude a single deed of shame. At what period were false titles and forged deeds of gift most in vogue? When the clergy alone knew how to read—when, from the superiority of their learning, they looked upon other men much as we look upon horses, that we could no longer control by the curb should their intellectual faculties be raised to a higher level. Why, in those days, was recourse had to wager of battel,<sup>1</sup> to ordeals by fire and water, to the forms of trial known as ‘the Judgments of God’?<sup>2</sup> Because, in the infancy of reason, men had no guiding principle that enabled them to discriminate, on judicial process, between truth and falsehood.

Contrast the results under governments which have re-pressed the spread of learning with those in countries where learning has been freely diffused. On the one side you have Spain, Portugal, Italy; on the other, England, Holland, North America. Where do you find the greatest happiness, the highest civilization? Where are the greatest number of crimes committed? Where do you find the community in the most agreeable and assured condition?

Comparison  
of various  
Régimes.

Too much renown has attached to foundations the ruling spirits of which have made a monopoly of knowledge. Take, for example, the priesthood of ancient Egypt, the Brahmins of Hindostan, the society of Jesuits in Paraguay. Upon these institutions it is proper to make two observations: first, that, if their conduct deserves praise, it is in relation to the interests of the very persons who invented these forms of government, not in relation to the interests

<sup>1</sup> This was a trial by combat, introduced by the Normans, but only used in three cases: one, military (in the court-martial, or court of chivalry and honour), the second in appeals of felony, and the third upon issue joined in a writ of right. It was abolished by 59 Geo. III., c. 46. (C. M. A.)

<sup>2</sup> When an offender, on arraignment, pleaded ‘Not Guilty,’ he might choose whether he would put himself for trial upon God and the country (i.e., by jury), or upon God only, and, in the latter case, it was called ‘the Judgment of God.’ The ordeal by fire was for freemen and persons of better condition; the water ordeal for bondmen and rustics (see Glanville, lib. xiv., c. 1). And see Sir F. Pollock’s *Genesis of the Common Law* (1912), pp. 19, 20. (C. M. A.)

of those who have been subject to them. I am willing to allow that the people have been found quiet and docile under such theocracies; but have they been happy? I cannot conceive this to be the case; if, indeed, abject servitude, vain terrors, useless vows, maceration, painful privations, and a gloomy creed, are any obstacles to happiness.

The second observation is that it was, by diffusing prejudice and propagating error, rather than by the mere maintenance of native ignorance, that these men have attained their end. In every instance the leaders themselves have ultimately fallen victims to their own narrow and contemptible policy. When a nation has been uniformly kept in a state of inferiority, by institutions opposed to every form of progress, it has, in course of time, ever become the prey of such other nations as have acquired a relative superiority. A nation thus retarded grows old while its people are yet in their childhood. Being under tutors and governors, who prolong the period of infancy that they may the more readily retain their control, the people offer an easy conquest; and, when once they are subdued, no change can come save in the weight of their chains, as they pass from one master to another.

**Liberty of  
the Press.**

But it may be said that no one suggests the desirability of mankind reverting to a state of ignorance; on the contrary, indeed, every government sees and admits the need for enlightenment. What really breeds alarm is, we are told, the liberty of the press. Our rulers, it is said, are in no wise opposed to the issue of scientific works; but are they not right in opposing the circulation of immoral and seditious writings, the evil effect of which can no longer be averted when once they have been published? If we inflict punishment on a guilty author, we may, perhaps, deter certain other men who might be tempted to imitate him; but to prevent the publication of mischievous books by the introduction of a censorship is to stem the corrupting stream at its fount.

We must allow that the liberty of the press has its inconveniences; but none of the ills that flow from it are to be compared with the evil of a censorship.<sup>1</sup>

Evils of the  
Censorship.

Where will you find that rare genius, that superior intelligence, that paragon of perfection, ever accessible to truth and never accessible to passion, to whom you can confide a supreme dictatorship over all the products of the human mind? Do you suppose that even a Locke, a Leibnitz, or a Newton, would have had the presumption to undertake it? And what is the power you are thus driven to bestow on men of more moderate capacity? It is a power which, of necessity, possesses the remarkable property of combining in its exercise every incentive to sinister shifts and unworthy betrayals of trust. What is a censor? He is an interested judge—a sole judge—an arbitrary judge—who sits in secret, condemns without a hearing, and decides without appeal. This secrecy, the greatest of all abuses, is of the essence of a censorship. To cause the case for the book to be publicly pleaded would be to publish the book in order to find out whether it ought to be published.

As to the range of the evil that may result, no estimate can be given, since no man can say where the ill effects will end. The danger is nothing less than that of arresting the progress of the human mind in every possible direction. Each new and interesting truth must have many enemies, on the mere ground that it is interesting and new. Are we to assume that the Censor will belong to the tiny little group who rise superior to established prejudices? And, even if he were endowed with such a rare strength of mind, would he have the courage to run any risk for the sake of discoveries in the glory of which he would have no share? There is only one safe course for him to pursue; that is, to proscribe everything that in any wise transgresses

<sup>1</sup> In India the Government has at times subsidized newspapers, with the hope of counteracting the seditious influence of part of the native press. It is said that the plan did not prove sufficiently successful to justify its continued adoption. (C. M. A.)

commonly accepted notions—to draw his scorching scythe across everything that rears its head above the ordinary conventional level. By prohibition he risks nothing; by permission he risks everything. He himself will suffer nothing by timidity, though truth will be stifled.

If it had been completely within the power of the constituted authorities to arrest the progress of human thought, where should we have been to-day? Religion, legislation, morals, the natural sciences, all would be in darkness. I do not propose in this place to cite instances but too familiar.

The best  
Censor is  
an enlight-  
ened  
Public.

The true censorship is that of an enlightened public, which, while encouraging useful discoveries, will brand with opprobrium all false and dangerous doctrines.<sup>1</sup> In a free country mere effrontery will not save a libellous publication from general contempt; while, by a contradiction easy to explain, the indulgence of the public in such a matter is always proportioned to the rigour of the government.

<sup>1</sup> 'In England, as on the Continent, the book trade was (during the sixteenth and seventeenth centuries) a monopoly, the censorship was in full vigour, the offences of authors and printers were treated as special crimes and severely punished by special tribunals. . . . In England the system of licensing, which was censorship under another name, was terminated rather than abolished in 1695. The House of Commons, which refused to continue the Licensing Act, was certainly not imbued with any settled enthusiasm for liberty of thought' (Dicey's *Law of the Constitution*, p. 274). For the arguments 'which did what Milton's *Areopagitica* had failed to do,' see Macaulay's *History of England*, edition of 1895, vol. ii., pp. 503, 504; cited by Dicey on p. 276. (C. M. A.)

## CHAPTER XLV

### OF INDIRECT METHODS OF PREVENTING THE DESIRE TO COMMIT OFFENCES.

WE have seen that legislation can operate only by influencing the power, the knowledge, or the will. We have already spoken of the indirect means of taking away the power to do injury; we have just shown that the policy which would seek to prevent men from acquiring learning and information would do a great deal more harm than good. All the indirect expedients which can be usefully employed must, then, have for their aim the direction and control of men's inclinations, the putting in practice of the rules of a logic hitherto but little understood, *the logic of the will*—a logic which would often seem to be in conflict with that of the understanding. As the poet has so well expressed it:

Indirect  
Expedients  
calculated  
to influence  
the Will.

'Video meliora, proboque,  
Deteriora sequor.'<sup>1</sup>

The expedients we are about to suggest are of a nature to get rid, in many cases, of this internal discord; to diminish that conflict of motives which so often arises simply from lack of skill on the part of the legislator—from an opposition between the natural and political sanctions, or between the moral and religious sanctions, an opposition created entirely by the legislator himself. If we could make all these powers co-operative to attain the same end,

<sup>1</sup> Ovid, *Metam.*, book vii., 20. Halévy, speaking of Bentham writes: 'Nouvel Aristote, il veut constituer cette logique de la volonté, qui existe au même titre que la logique de l'entendement' (vol. i., p. 53). (C. M. &.)

all the faculties of man would be in harmony, and he would no longer feel any inclination to do injury. In cases where this end cannot be achieved, we must, at all events, take care that the tutelary motives shall, in point of strength, more than countervail the seducing motives.

Problems  
to be  
solved by  
the em-  
ployment  
of indirect  
Expedients.

I am now about to present, in the form of political or moral problems, the various indirect expedients through which we may influence the will; and, by taking a series of examples, I will show how the solution of these problems may be effected.

*First Problem.*—To divert the course of dangerous desires, and to direct the inclinations towards such amusements as are most agreeable to the public interest (Chapter XLVI., *post*, p. 196).

*Second.*—To arrange so that a given desire may be satisfied without injury, or with the least possible injury (Chapter XLVII., *post*, p. 205).

*Third.*—To avoid furnishing encouragements to crime (Chapter XLVIII., *post*, p. 221).

*Fourth.*—To increase the capacity to answer for the due discharge of obligations, in proportion as the amount of the temptation to violate them increases (Chapter XLIX., *post*, p. 227).

*Fifth.*—To diminish the sensibility to temptation (Chapter L., *post*, p. 228).

*Sixth.*—To strengthen the impression of punishments upon the imagination (Chapter LI., *post*, p. 231).

*Seventh.*—To facilitate knowledge of the fact of the offence (Chapter LII., *post*, p. 236).

*Eighth.*—To prevent an offence by giving to a number of persons an immediate interest in impeding its commission (Chapter LIII., *post*, p. 255).

*Ninth.*—To improve the methods for recognizing and tracing individual offenders (Chapter LIV., *post*, p. 257).

*Tenth.*—To increase the difficulties in the way of a delinquent's escape (Chapter LV., *post*, p. 261).

*Eleventh.*—To diminish the uncertainty of process and of punishment (Chapter LVI., *post*, p. 263).

*Twelfth.*—To prohibit accessory offences with a view to preventing the principal offence (Chapter LVII., *post*, p. 268).

After dealing with these expedients, directed to special objects, we will point out others of a more general character, such as the cultivation of honour and goodwill, the employment of the religious motive, and the use to be made of the influence of instruction and education.

## CHAPTER XLVI.

### PROBLEM I.

*To divert the Course of Dangerous Desires, and direct the Inclinations towards such Amusements as are most Agreeable to the Public Interest.*

Object of  
indirect  
Legislation.

THE object of direct legislation is to combat pernicious desires by prohibitions and penalties, directed against the injurious acts to which those desires may give rise. The object of indirect legislation is to counteract the influence of pernicious desires by augmenting the strength of such less dangerous desires as may struggle with them for the mastery.

There are two matters to be considered : What are the desires that it would be expedient to eradicate or impair ? By what means can that end be attained ?

Vicious  
desires.

Now, pernicious desires may be ascribed to three sources : (a) The malignant passions; ( $\beta$ ) the craving for strong drink; and ( $\gamma$ ) the tendency to idleness. The modes of eradicating or impairing such desires may, in like manner, be reduced to three heads: (a) Encouraging rational forms of entertainment; ( $\beta$ ) favouring the consumption of non-intoxicants rather than alcoholic stimulants; and ( $\gamma$ ) taking care not to drive men into a condition conducive to idleness.

Some persons may feel surprise that our catalogue of vicious inclinations is so limited; but I would beg them to remark that the human heart harbours no passion which is wholly and absolutely bad. There is, perhaps, not one which does not stand in need of a controlling hand; and yet there is none that should be extirpated.

When the angel Gabriel prepared the prophet Mahomet for his divine mission, he plucked from the prophet's heart a black spot which contained the seeds of evil. Unfortunately this operation cannot be practised on the hearts of ordinary men: the seeds of good and the seeds of evil are inseparably mixed. Our inclinations, it is true, are controlled by motives; but every pain to be avoided, every pleasure to be pursued, in itself constitutes a motive. Hence, these countless motives may produce all sorts of effects, from the best to the worst.

Inter-  
mingling  
of good and  
evil Desires.

They are, as it were, trees that bear delicious fruits or baneful poisons, according to the situation in which they are planted; according to the care displayed by the gardener; nay, even according to the wind that blows or the heat of the particular day. The purest benevolence, if it be mistaken in its methods or too exclusive in its objects, may prove a source of crime; while a due regard to selfish considerations, although it may occasionally become harmful, is often very necessary. In spite of their repulsive mien, even the malignant passions are at least useful as weapons of defence and as a shield against assaults directed by personal interest. We are not, then, concerned to uproot any impulse or affection of the human heart; for there is not one that does not play its part in developing the system of Utility.

We should work on them in detail, guided by the direction which they take and the effects which they seem likely to produce. We may, moreover, adjust these inclinations in convenient counterpoise, by strengthening those that are found to be too weak, and by impairing those that are apt to prove too strong. Thus it is that the husbandman directs and controls the course of the streams, in such fashion as to avoid stinting the supplies necessary for irrigation, and yet at the same time so as to prevent, by means of dikes, the flooding of his lands. But mark that the art of constructing dikes consists in not directly opposing the

violence of the current, which would otherwise carry away every obstacle placed in its course.

The passion for intoxicating liquors is, properly speaking, the only one that can be extirpated without giving rise to any form of mischief; for the angry passions are, as I have said, a necessary stimulant in cases where individuals have to protect themselves against injury and to repel the attacks of their enemies. The love of ease is not in itself harmful; but indolence is specially evil in that it favours the ascendancy of the mischievous passions. We may, however, consider each of the three classes of desires as needing to be resisted with the like determination. There is little ground for fearing that we shall ever score too complete a victory over the inclination to indolence, or that we shall reduce the vindictive passions below the point of their utility.

Encourage-  
ment of  
rational  
forms of  
Entertain-  
ment.

The first expedient, as I have stated, is to *encourage rational forms of entertainment*. This is one branch of that very complex and sufficiently ill-defined science which is directed towards the advancement of civilization. The state of barbarism differs from that of civilization in two characteristic features: (i.) The strength of the *irascible* appetites; (ii.) the smaller number of objects of enjoyment which offer themselves to the *concupiscent* appetites.<sup>1</sup>

The occupations of a savage when he has satisfied his physical wants—the only wants he knows—are soon described. The pursuit of vengeance; the pleasure of drunkenness, if the means are at hand; sleep, or the most perfect idleness: these are the whole of his resources. Each of his inclinations is favourable to the development and to the exercise of every other: resentment finds easy access to a vacant mind; idleness leads to drinking; while drunkenness begets quarrels which foster and multiply feelings of resentment. The pleasures of love, not being intermingled with the sentimental refinement that adds so largely to their

<sup>1</sup> This distinction of the schoolmen is sufficiently complete. To the first class belong the pleasures of malevolence, to the second all other pleasures (Dumont).

charm and delights, do not appear to play any great part in the life of the savage, and do not go far towards filling up his intervals of leisure.

Under a regular system of government, the protection of the laws affords a substitute for vengeance, and any indulgence in the pleasure of revenge is restrained by the dread of punishment. Moreover, the influence of indolence is impaired; but the craving for strong drink is in no way diminished. A nation of savages and a nation of huntsmen are convertible phrases. The life of a man who follows the chase, like the life of the fisherman, offers long intervals of leisure, in case the sportsman be skilled in the preservation of the food-supplies with which he fills his larder. But in a civilized State the mass of the community consists of labourers and artisans, who have barely leisure enough to sleep and relax their weary limbs. The misfortune is that the craving for strong drink can be gratified in the midst of a life of hardest toil, while it encroaches on the hours allotted to rest and repose. Among the lower orders poverty serves as some check; but artisans, whose work is better paid, may make great sacrifices to this dread desire, and the richer folk may, if so minded, devote their whole time to its gratification. Thus we see how it was that, in the days of barbarism, the ruling classes simply divided their lives between war, the chase—which is a mere image of war—the animal functions, and long-continued feasts of which drunkenness formed the chief attraction. Such is the life-story of a great landowner, a great feudal lord of the middle ages. It seems to have been the special privilege of this noble warrior, this noble sportsman, to have preserved, in a more civilized state of society, the character and occupations of the savage.

This being so, it is plain that every innocent amusement which human art can devise is useful from a double point of view: First, by reason of the pleasure which results from it directly; and, secondly, from its tendency to weaken the

The Barbarism of feudal Times.

Utility of innocent Amusements.

dangerous inclinations that nature is ever prompting in the bosom of man. And, when I speak of innocent amusements, I include all such as cannot be shown to be harmful. Their introduction being conducive to the happiness of society, it becomes the duty of the legislator to encourage such amenities, or, at least, to place no obstacle in their way. I proceed to enumerate these sources of amusement, beginning with those commonly regarded as the more gross, and then mentioning such as are more suggestive of refinement:

Increase of  
Variety in  
Food.

(a) The introduction of variety in the kinds of food we use, and improvement in the art of gardening, directed to the production of nutritious vegetables.

Introduc-  
tion of  
Non-intoxi-  
cants.

(β) The introduction of non-intoxicating drinks, of which tea and coffee are the principal. These two articles, which some superficial minds will be surprised to see figuring in a catalogue of moral objects, are so much the more useful because they come into direct competition with intoxicants.<sup>1</sup>

Increased  
Elegance.

(γ) Improvement in everything which constitutes elegance, whether in dress, furniture, the ornamentation of gardens, etc.

Games and  
Pastimes.

(δ) The invention of games and pastimes, whether active or sedentary, among which card games hold a distinguished place. I exclude none but games of chance. These quiet amusements have brought the sexes in closer association, and have diminished ennui, the special ailment of the human race, and in particular of wealth and old age.

Music.

(ε) The cultivation of music.

Theatres,  
etc.

(ζ) Theatres, assemblies, public entertainments.<sup>2</sup>

<sup>1</sup> The celebrated Hogarth painted two pictures, 'Beer Street' and 'Gin Lane.' In the first there is a general air of gaiety and health; in the second all is disease and misery. This excellent artist instructed by his pencil, and he had reflected more on morals than had those who set up as professors of the science (Dumont).

<sup>2</sup> 'I have heard M. d'Argenson say that, when he was Lieutenant of Police, there was more vice and debauchery in Paris during the fortnight at Easter when the theatres were closed than during the season of four months in which they were open' (*Memoirs of Pollnitz*, vol. iii., p. 312) (Dumont).

(7) The cultivation of the arts, of science, and of literature. Science and Arts.

When we consider these different expedients for enjoyment, in contrast with the means necessary for the provision of subsistence, they are called *objects of luxury*. If their tendency be such as we have suggested, luxury, singular as it may appear, is a source rather of virtue than of vice. This branch of policy has not been entirely neglected; but it has been studied in its political rather than in its moral aspect. The object has not been so much to bring the citizens into closer union, to make them more happy, more industrious, or more virtuous, but to keep the people quiet and render them more submissive to their rulers. The games of the Circus were, among the Romans, one of the principal objects to which the government directed attention. They were not used simply as a mode of conciliating the goodwill of the people, but as an expedient for diverting their thoughts from the conduct of public affairs. The saying of Pylades<sup>1</sup> to Augustus is well known. Utility of these amonitions.

Cromwell, who by his ascetic principles was deprived of this resource, had no other means of occupying the public mind than engaging the nation in foreign wars.

At Venice, a government, jealous of its authority to the last degree, showed the greatest indulgence to pleasures.

The religious processions and feasts of the Church in Catholic countries, to some extent, fulfil the same object as the games of the Circus.

All these institutions have been regarded, by political writers, as so many means of alleviating the yoke of authority—of directing the attention of the people towards pleasing objects, and so preventing them from occupying their minds with public affairs. This effect, while it was, perhaps, not contemplated at the time of their original

<sup>1</sup> A pantomime actor, whose rivalry with Bathyllus led to tumults. 'It is better,' said he to Augustus, 'that the citizens should quarrel about us than about a Pompeius and a Cæsar' (*Dion. liv. 17*). (C. M. A.)

establishment, has undoubtedly added greatly to the favour afterwards bestowed upon them.

Attitude of  
Peter the  
Great.

Peter the Great had recourse to a nobler and more generous policy. Except as to their drinking habits, the manners of the Russians savoured rather of Asia than of Europe. Wishing to moderate the grossness, and temper the ferocity, of their customs, Peter employed certain expedients which were, perhaps, a trifle too direct. He afforded every possible encouragement to the introduction of the arts of Europeans, their dress, their entertainments, their assemblies—nay, to this end, he even resorted to violence. Now, to lead his subjects in this way to imitate the other nations of Europe was neither more nor less than to civilize them; yet he encountered a stout resistance to all his innovations. Envy, jealousy, contempt, and a host of anti-social passions urged the Russians to repel assimilation with their foreign rivals. When, however, the outward marks of distinction had been swept away, these passions no longer found objects to attack; in taking away from his people their external distinctions, Peter took from them, so to speak, both the pretext for their stupid rivalry and the aliment on which it was nourished. He associated them with the great republic of Europe; and they had everything to gain by such association.

Sunday  
Entertain-  
ments.

A rigid observance of the Sabbath, such as is demanded in Scotland, in England, and in some parts of Germany, involves a violation of this policy. The Act of Parliament passed in 1781 seems more suited to the age of Cromwell than to our own time.<sup>1</sup> It was so drafted as to debar the people from every form of amusement on Sunday except the sensual pleasures, debauchery, and drunkenness. It was in the name of good morals that this law so contrary

<sup>1</sup> The reference is to the statute 21 Geo. III., c. 49, providing that any house or place, opened for public entertainment, or for publicly debating on any subject, upon the Lord's Day, shall be deemed a disorderly house, in case persons are admitted by money or tickets sold. (C. M. A.)

to morality was enacted. By this kind of rigour Sunday becomes an institution to the honour of sloth, prolific of vice in every shape.

Sunday  
Entertain-  
ments—  
condemned.

Such a law can only be justified by two suppositions: first, that amusements, which are innocent six days in the week, change their nature and become mischievous on the seventh; secondly, that idleness, which is the mother of all the vices, serves as a safeguard of religion. I do not know what to make of these notions: *videant doctiores*.<sup>1</sup>

If a revealed law chance to be in conflict with good morals, we ought not to yield obedience to it; for we have more certain proofs of the political effects of an accepted principle than we can possibly have of the truth of a religious story, the evidence of which is based on a series of supernatural events. In the one case we have the testimony of our own senses; in the other case we are driven to rely on the testimony of tradition, weakened as it is by such changes in its original features as attend, in a greater or less degree, every transmission of the revelation.

But, in point of fact, this conflict does not exist. A rigorous observance of the Sabbath has no foundation in the Gospel; it is, indeed, contrary to the teaching and express examples of its text. The learned Fénelon, whom none will accuse of misconceiving the spirit of Christian morals, rebuked the indiscreet severity of the clergy, and did not wish the people of his diocese, after their religious exercises on Sunday, to be forbidden to indulge in dancing or manly sports.

What I here seek to censure is not a day of rest from ordinary toil, nor a day devoted in part to religious wor-

<sup>1</sup> The chaplain of Newgate is at pains to have it inserted in the biographies of malefactors, as on their own confession, that their crimes began by breaking the Sabbath. I fancy he would be nearer the truth if he said that the original cause of their evil life was the observing of the Sabbath—that is, observing it in a particular fashion. Not knowing how to spend their time and their money, what resource have they but the tavern? Drunkenness renders them quarrelsome and stupid, destroys their health, their fitness for work, and their saving habits, and leads them into bad company and careers of crime (Dumont).

ship, but the absurdity of making it an offence to perform necessary tasks of husbandry or to engage in harmless pastimes under the public eye.

To deprive the people, one day in the week, of pleasures admittedly innocent is to deprive them of a portion of their happiness: for, if happiness be not compound of amusements, of what is it, then, composed? How is it possible to justify the severity of the legislator who, without necessity, robs the labouring classes of those little enjoyments that sweeten the bitter cup of toil, and, under the pretext of religion, drives them to gloomy thoughts or to the haunts of vice?

Depriving  
the people  
of innocent  
Pleasures is  
a vicious  
form of  
Tyranny.

In any country, the people or the government—no matter which—may do mischief in either of two ways. The one is to introduce pain; the other is to drive away pleasure. If one of these ways deserves condemnation, how can the other be worthy of praise? Both are acts of tyranny; for otherwise in what does tyranny consist? Mark clearly that I here speak only of *effects*. I know well enough that some good result is hoped for; but it is far easier to reason vaguely and on the surface than to plumb the depths; to float hither and thither between folly and wisdom than to persist in the one or the other; to follow the stream of prejudice than to resist its current. However good the intention, it is certain that the tendency of this asceticism is immoral and harmful.

Happy the nation which is found to rise above gross and brutal vices, to study refinement of manners, the pleasures of social communion, the decking of gardens, the fine arts, science, public diversions, the development of the mind! Religions which inspire gloom, governments which render men mistrustful and part them from their fellows, carry the germs of the greatest vices and the most hurtful passions.

## CHAPTER XLVII.

### PROBLEM II.

*To arrange so that a Given Desire may be satisfied without Injury, or with the Least Possible Injury.*

OUR desires (alike those of which we have just been speaking and others of which no mention has yet been made) are susceptible of being satisfied in various ways and under different conditions—through every single grade of the moral scale, from innocence to the most heinous criminality. Our first object should be to contrive that these desires may be so satisfied without resulting injury; but, if that end cannot be attained, our aim should then be to insure that their gratification shall not entail upon the community an injury so great as that which would result from the operation of a restrictive law.

The Satisfaction of Desires. Objects to be aimed at.

If neither of these objects can be secured, we should so adjust matters that an individual, placed by his desires between two offences, will be prone to choose the less harmful of the two. This last aim seems modest enough, for it is a sort of composition with evil; we are, so to speak, trafficking with vice, and seeking to satisfy it at the lowest possible cost to the community.

Let us see how far it is possible to deal on these lines with three groups of imperious desires: ( $\alpha$ ) Vengeance; ( $\beta$ ) the desire to secure the means of subsistence; ( $\gamma$ ) the sexual passion.

## § I.

**Vengeance.** There are two expedients for satisfying the vindictive desires without injury. First, to provide legal redress for every kind of wrong; secondly, to provide adequate redress for such injuries as affect only the point of honour.

If we would satisfy the vindictive appetites otherwise, and yet with the least possible injury, there is only one expedient, and that is to show indulgence to duelling.

Let us deal separately with these several expedients.

**Provision  
of legal  
Redress  
for all  
Injuries.**

(a) *To provide Legal Redress for Every Kind of Wrong.*—

The vices and the virtues of mankind depend largely upon the circumstances of society for the time being. Hospitality, it has been observed, is most practised where it is most needed. So it is with vengeance. In the state of nature, the fear of private vengeance is the only check on brute force, the only safeguard against the violence of the passions: it corresponds with the fear of punishment in a society controlled by law. Every advance in the administration of justice tends to lessen the strength of the vindictive appetites and to prevent acts prompted by personal animosity (*cf. ante*, Vol. ii., p. 104).

In providing legal redress, the principal interest to be kept in view is that of the injured party. But even the aggressor derives advantage from such a provision; for, if we leave a man to avenge himself, his vengeance knows no bounds. Grant him what you, in cold blood, regard as adequate compensation, while forbidding him to seek for more, and he will then prefer to accept what you give him, without incurring any risk, rather than to expose himself to the condemnation of the law by attempting, on his own account, to snatch a greater indemnity. Here, then, we have an accessory benefit resulting from our care to provide redress through the courts: reprisals are prevented. Beneath the shadow of the buckler of Justice, the aggressor,

after his wrong-doing, finds himself in a state of comparative security, under the protection of the law.

It is clear enough that the better provision we make for legal redress, the more do we diminish the motive which impels the injured party to seek reparation on his own account. If every pain a man could endure at the hands of his fellow were immediately followed by a pleasure, equivalent in his eyes to the pain he had just suffered, the irascible appetite would cease to exist. Such a supposition manifestly lies outside the range of possibility; but, exaggerated as it is, the conception will serve to show that every improvement we can effect in this branch of justice tends to diminish the force of the vindictive passions.

Speaking of the barbarous periods of English history, Hume has observed that the chief difficulty was to induce the injured party to accept compensation, and that the laws relating to satisfaction were directed as much to limiting the man's resentment as to affording him reparation.

One more consideration. Institute legal punishment for an injury, and you create an opening for generosity; you create a virtue. To pardon an injury when the law offers you satisfaction for it is to assume over your adversary a sort of superiority, by force of the obligation you impose upon him. No one can, in such circumstances, ascribe the pardon to weakness; the motive is above all suspicion.

(β) *To provide Adequate Redress for Such Injuries as specially assail the Point of Honour.*—This class of injuries deserve particular attention, inasmuch as they have a peculiarly well-marked tendency to arouse the vindictive passions.

Redress for  
injuries  
that  
specially  
assail  
Honour.

But I have already dealt with the subject at sufficient length in Chapter XXVIII. of Part I. ('Of Honorary Satisfaction,' *ante*, Vol. II., p. 85).

In this connection the laws of France have long been superior to those of other nations, while English jurispru-

Injuries  
that assail  
Honour—  
could.

dence is conspicuously defective. It knows nothing of honour, and has no means of gauging a corporal insult, save by measuring the dimensions of the wound. It cannot conceive of any evil in the loss of reputation other than the loss of money which may chance to result from it. It regards money as a remedy for every ill, a palliative for every affront, a counterpoise to every insult. The man to whom no money compensation has been granted has got nothing at all; the man to whom it has been accorded must look for nothing more. There is no further reparation possible. But we ought not to reproach the present generation for the barbarism of a ruder age; these laws were enacted before sentiments of honour had been developed. Honour is now recognized by the tribunal of public opinion, and its decrees are pronounced with an emphatic and quite peculiar authority.

It cannot, however, be doubted that the silence of the laws has had a marked effect on morals. An Englishman cannot visit France without observing how much more, in that country than in his own, the sentiment of honour and a contempt for money descend, so to speak, to the lower classes of the community. This difference is especially noticeable in military circles. The sentiment of glory, the pride in an absence of interested motives, are everywhere reproduced among the common soldiery, who would consider a noble action tarnished by putting a price upon it. With them, a sword of honour is the richest guerdon that man can secure.

Indulgence  
to the  
Duel.

(γ) *To show Indulgence to Duelling.*—If the person insulted will not rest content with the satisfaction offered by the laws, we must needs show indulgence to the duel. Where duelling is in vogue, poisoning and assassination are seldom heard of; the comparatively slight mischief which results from the practice becomes, as it were, a premium of insurance, whereby the nation secures a guarantee against the grave evil of those two crimes.

Duelling conserves the peace and promotes good manners; the fear of being compelled to give or to receive a challenge nips quarrels in the bud.<sup>1</sup> The Greeks and the Romans, we are told, were deeply imbued with the sentiment of glory, and yet knew nothing of duelling. So much the worse for those nations: with them the sentiment of glory was in no wise at variance with the use of poison or the dagger.<sup>2</sup> During the political conflicts of Athens, one half of the citizens were in a conspiracy to exterminate the other half. Mark what takes place in England or in Ireland to-day, and contrast the situation with the dissensions that distracted Greece and Rome. According to our customs, Clodius and Milo would have fought a duel: following the fashion in vogue at Rome, each of them plotted to assassinate the other, so that the one who managed to kill his adversary merely forestalled him by so doing. In the island of Malta, the passion for duelling had become almost a mania; and the practice amounted, so to speak, to a sort of civil war. Accordingly, one of the Grand Masters enacted such severe laws, and put them into force with so much rigour, that the duel became obsolete; but it was only to give place to a crime which combines cruelty with cowardice. Assassination, hitherto unknown among the Knights, became so common that everyone began to regret the disappearance of duelling, and in the end the duel was expressly tolerated at a certain spot and within certain hours. The result was just what had been hoped for: and when vengeance was afforded a clear and open course, clandestine methods again became accounted infamous, as they had been in former days.

In Italy duels are less common than in France or England, but poisoning and assassinations are much more rife.

In France the laws against duelling were strict, but means were found to elude them. When it was decided

<sup>1</sup> But see *ante*, vol. ii., p. 95, note. (C. M. A.)

<sup>2</sup> Merivale asserts that 'assassination was almost unknown to a late period among the Romans' (*History*, vol. v., pt 269; cf. vol. ii., p. 399). (C. M. A.)

to fight, the combatants, by way of prelude, concocted some substantial ground of dispute.

In England the law confounds duelling with murder; but juries will not have it so: they acquit, or, what comes to the same thing, they return a verdict of manslaughter.<sup>1</sup> Good sense serves as a better guide to the layman than science has proved to the lawyers. But it would seem far more expedient to afford some remedy within the laws than to trust to one that involves their being set at naught.

### § 2.

Desire to  
secure  
means of  
Subsist-  
ence.

We now approach the consideration of the desire to secure means of subsistence; and herein we must have regard to the interests alike of the poor themselves and of the community at large.

A man deprived of the means of subsistence is driven, by the most irresistible of all impulses, to commit any offence which will serve to supply his wants. Where this stimulus exists, it is idle to combat it by the fear of punishment; for there is scarcely any punishment that can really be so great as that of death from hunger, while, when we consider the uncertainty and remoteness of legal punishments, there is, perhaps, none that can even appear so great. We see, then, that the only sure way to ward off the effects of such a stimulus is by providing the necessities of life to those who stand in need of them.

Classifica-  
tion of in-  
digent  
Persons.

From this point of view, the indigent classes may be ranged in four groups: (α) The industrious poor, who ask only for work to enable them to live; (β) idle beggars, who had rather wander abroad and trust to precarious charity than earn a living by honest labour; (γ) suspected persons, who, having been arrested for some crime, but discharged for want of sufficient evidence, bear a stain upon the character which prevents them from finding employment; (δ) criminals,

<sup>1</sup> Dumont adds as an explanation of manslaughter 'homicide in - volontaire' (cf. *ante*, vol. ii., p. 91, note). (C. M. A.)

who have completed their terms of imprisonment and been restored to liberty.

These different groups ought not to be treated in the same way; and, in institutions for the poor, particular care should be taken to separate innocent persons from rogues or vagabonds to whom some suspicion has attached. 'A single scabbed wether,' so runs the adage, 'will taint the whole flock.'

Anything which the poor can be forced to earn by the sweat of the brow is not merely a profit to the community at large—it is a gain to the poor themselves. To keep them alive is not enough; we must provide occupations to fill up their time. Humanity requires us to find something to engage the attention of the deaf, the blind, the dumb, the maimed, the impotent, the infirm. The wages of idleness are never so sweet as the reward of industry.

If a man has been arrested for a crime arising from indigence, even though he be acquitted, he should be compelled to give an account of his means of subsistence during the last six months, or some longer period. If those means prove to have been honest, the inquiry can do him no harm; if otherwise, we must act accordingly.

*Inquiry as to means of livelihood.*

Women, especially those in a condition of life a little above ordinary labour, are placed at a disadvantage in finding occupation. Men, having more activity, more freedom, and, it may be, more dexterity, often seize on such forms of labour as are more suited to the female sex, and at times engage in those that seem almost unbecoming in the hands of a man. We find men selling children's toys, keeping milliners' shops, making shoes, stays, and dresses, for women. It is men, even, who discharge the office of midwives. I have doubted whether the injustice of this custom should not be redressed by the law; whether women ought not to be put in possession of such means of subsistence to the exclusion of men. It would be an indirect method of preventing prostitution, by securing for women

*Position of Women as to Occupation.*

some suitable forms of occupation. The practice of employing men as accoucheurs, which has excited some lively protests, is not yet generally adopted, except in the higher classes, where anxiety is greater, or in the lower when the particular case presents dangerous features.<sup>1</sup> It would, however, be perilous to exclude men by law, until female students had been trained to occupy their places with efficiency.

Treatment  
of the  
Poor.

As to the treatment of the poor, no measure can be proposed which would prove of universal application: we must make arrangements to conform with national and local circumstances. In Scotland, save in some large towns, the government does not intermeddle with the care of the poor: in England the amount of the taxes raised for their support reaches three millions sterling.<sup>2</sup> And yet their condition is better in Scotland than in England; the object is better attained by customary usages than by statutory laws.<sup>3</sup> Notwithstanding the inconveniences of the English system, it could not be suddenly abolished: otherwise one half of the poor would perish before the necessary habits of thrift and benevolence had taken root. In Scotland the influence of the clergy is peculiarly salutary; enjoying but a modest stipend and no tithes, the ministers are well known and highly respected throughout their parishes. In England, the clergy being rich and possessed of the tithes, the parson is often at loggerheads with his flock, and knows very little about them.

Influence  
of the  
Clergy.

Serious  
situation  
of England.

In Scotland, Ireland, and France, the wants of the poor are moderate. At Naples the climate saves the expense of fire, lodging, and almost of clothes. In the East Indies clothes are hardly necessary, except on the score of decency. In Scotland domestic economy is satisfactory in all respects, except in the matter of cleanliness: in Holland it is as good

<sup>1</sup> Written in 1782 (Bowring).

<sup>2</sup> In 1891 the amount of public assistance had increased to 8½ millions. In 1901 it had risen to 13 millions, and in 1910-11 to 24 millions. (C. M. A.)

<sup>3</sup> But, in Scotland, the *idle* were, at an early date, distinguished from the *infirm*, and very differently treated. (C. M. A.)

as it can be in every respect. In England the needs of the poor are greater than elsewhere, while economy is, perhaps, on a worse footing than in any country in the world.

The best and surest method is not to await destitution, but to prevent it. The greatest service we can render to the working classes is to found savings-banks, in which the poor, attracted by the prospect of both safety and gain, may be inclined to deposit their savings, even in the smallest amounts.

Destitution should be prevented, not relieved. Savings Banks.

### § 3.

We now come to the group of desires for which no neutral name can be found—no name, that is to say, which does not present some accessory idea of praise or of blame and in particular of blame. The reason is not far to seek. Asceticism has never ceased to denounce and brand as criminal the desires to which Nature has confided the perpetuation of the species. Poetry, on the other hand, as a protest against such false assumptions, has adorned the image of voluptuousness and love—a laudable object enough when the muse has respected decency and good manners. We may, however, remark that the sexual inclinations are by nature sufficiently strong, and do not need to be prompted by exaggerated and seducing imagery.

Sexual Desires.

Since this desire is satisfied by marriage, not merely without injury to society, but in a manner distinctly to its advantage, the chief object of the legislator in this regard should be to facilitate marriage—that is to say, to refrain from placing in its way any obstacle not absolutely necessary. So, too, on the like grounds, he should authorize divorce, subject to suitable restrictions: for although, in point of fact, a marriage is thereby dissolved, the union so dissolved was one that was apparent only, while the divorce will, in all human probability, be followed by a marriage that is real and genuine. 'Separations,' allowed in countries where marriage is indissoluble, are attended by the

Marriage and Divorce. Marriages should be facilitated.

Marriage  
and  
Divorce—  
*contd.*

inconvenience of either condemning the parties to the privations of celibacy or involving them in illicit commerce.

But, if we are content to speak upon this delicate question fairly and frankly, with a freedom more becoming than any hypocritical reserve, we shall at once acknowledge that there is an age at which man has reached the fulness of his powers, although his mind is not yet ripe for the conduct of affairs or the management of a family. This is specially true in respect to the higher ranks of society. Among the poor, the daily round of labour diverts the promptings of love and retards the natural development; for a longer period, their more frugal diet and simpler mode of life check the growth of physical desire and the play of the imagination. Besides, the poor are rarely able to buy the favours of the other sex, save by a sacrifice of their own liberty at the altar.

Quite apart from youths who are not yet marriageable except from the purely physical point of view, how many men are there to be found wholly incapable of defraying the cost of maintaining a wife or charging themselves with the cares of a family! On the one hand, servants, soldiers, and sailors, living in a dependent condition and often without any fixed place of abode; on the other hand, men of higher rank awaiting a fortune or an establishment. Here we have a very large number of men precluded from marriage and reduced to forced celibacy.

Connubial  
Contracts  
for limited  
Periods.

The first expedient that occurs to one for mitigating this evil would be to legalize connubial contracts for limited periods. This expedient is attended by certain inconveniences: but we must remember that, in every community where there is great disparity in fortunes, concubinage, in fact, already exists. By prohibiting such arrangements, they may be rendered shameful—nay, even criminal; but they will not thus be prevented. Those who dare openly to avow them proclaim their contempt

for laws and customs, while those who keep them secret are wont to suffer from searchings of conscience in proportion to their moral sensibility.

Marriages  
with a  
Time Limit  
—could.

Following the common course of thought, the idea of virtue is associated with the connubial contract if it be for an indefinite period, but the idea of vice if it be limited in point of time. Legislators have adopted this view, and prohibited the making of such a contract for a year, while they have allowed it to be entered into for a lifetime. The same arrangement, criminal in the one case, is, forsooth, quite innocent in the other. What can we make of this distinction? Can the mere duration of the engagement change from white to black the nature of the arrangement in its essence?

But, though marriage with a time limit may in itself be innocent, it does not follow that it will be as honourable an estate for the woman who enters upon it. She will never secure the same amount of respect as the wife for life. The first idea that would occur to one in this connection would be: 'If this woman had been as worthy as others, she would have managed to obtain the same conditions as they have done. This precarious engagement is surely a mark of inferiority, either in social position or personal deserts.'

What, then, would be the advantage of sanctioning contracts of this kind? It would consist in saving the law, which prohibits them, from being constantly set at naught. It would, further, preserve the woman, who becomes a party to the arrangement, from a humiliation which, after degrading her in her own eyes, almost always draws her towards the lowest depths of depravity. It would, moreover, establish the birthright of her children and assure them of a father's care. In Germany what are known as *left-handed marriages* have received general recognition. The object has been, to reconcile domestic happiness with family pride. The woman in this way has

acquired some of the privileges of a wife; but neither she nor her offspring assume the name or the rank of her spouse. Such alliances were forbidden by the Code Frederic, though the King reserved to himself the right of granting special dispensations.

When I advance an idea so much at variance with public opinion, I ought to remark that I do not propose such an arrangement as good in itself, but as an expedient for mitigating an existing evil. In countries where manners are so simple and fortunes so equal that there is no need for the expedient, it would, of course, be folly to introduce it. It is not proposed as a rule of life, but as a remedy.

Prostitution.

I must make a like apology when I come to speak of a still graver form of disorder. There exists, especially in the larger cities, yet another evil which springs from inequality of fortune and from all the varying causes that conspire to increase celibacy. That evil is prostitution.

There are countries where the laws tolerate it: there are others in which it is strictly prohibited, as in the case of England.<sup>1</sup> But, although prohibited, it is as common and as openly practised as one can imagine, because the Government dare not deal drastically with it, and, if they made bold to do so, the public would by no means approve any such display of authority. Prostitution, prohibited as it is, prevails as extensively as if there were no law against it, while its practice is even more mischievous.

The infamy attached to prostitution is not altogether the work of the laws: there has been in every age a certain degree of shame associated with this condition, even when the political sanction was as yet inoperative. The state of the courtesan is one of dependence and servitude, her resources are precarious, she is ever on the brink of famine and destitution. Her name, too, is linked with an evil

<sup>1</sup> Keeping a bawdy-house was punishable at common law with fine and imprisonment and the pillory. (C. M. A.)

which, beyond all others, distresses the imagination; for these poor creatures are unjustly regarded as causing the very disorders of which they are themselves the victims. There can be no need to indicate the sort of treatment likely to be meted out to them by the women distinguished as 'modest.' The most virtuous, perhaps, pity them; but all, with one accord, pour contempt upon them. No one makes any attempt to succour or support them. It is, therefore, natural that they should be overwhelmed by the weight of public opinion. They have never sought to create bonds of social union among themselves such as might serve as a counterpoise to public contempt; and were they to seek to do so, they would fail. Suppose such a union could be effected and cemented by the interests of common defence, rivalry and want would soon dissolve it. The person, as well as the name, of a whore is an object of hatred and scorn even to those who engage in the same mode of life. It is, perhaps, the only calling openly despised by the persons who publicly profess it. With striking inconsistency, self-love seems to avert its eyes from its own misfortunes; the unhappy wretch seeks to forget what she is, or tries to create an exception in her own favour by severe treatment of her companions.

Kept women share, to a very large extent, the infamy attached to the condition of common prostitutes. The reason for this is very simple; they do not as yet belong to that class, but they always seem to be on the verge of descending into it. Still, the longer the same woman has lived with the same man, the further is she removed from a state of degradation, the nearer does she approach to the condition of the chaste matron. The greater the duration of the connection, the more difficult would it seem to break it, the greater the prospect of its permanency.

Now, to what conclusion do these considerations point? The evil carries with it its own punishment. It is this: that the remedy, so far as any remedy is possible, is to be found in the evil itself. The greater the contempt

poured on this mode of life in the ordinary course of nature, the less the necessity for branding it with any legal stigma. The condition carries with it its own natural punishment—a punishment that seems already too severe, when we weigh all the considerations which should dispose us to pity this unhappy class, these victims of social inequality, plunged as they are, for the most part, in the depths of despair. How few of these women have embraced the calling from choice, with full cognizance of what they were about! How few would persist in it, if they could but find some mode of escape, if they could but emerge from this slough of sorrow and shame, if they were not driven from every walk of life in which they could hope to find a living! How many have been lured into the path of shame by the folly of a moment; by the inexperience of youth; by the corrupting influence of their parents; by the crime of a seducer; by pitiless severity for a first fault!—almost all through misery and destitution. If public opinion be tyrannical and unjust, ought the legislator to aggravate the injustice; ought he to lend himself as an instrument in the service of harshness and tyranny?

Effect of  
laws  
against  
Prostitution.

Besides, what is the effect of these laws? It is to deepen the depravity of which these unhappy creatures are accused; to drive them into drunkenness or undue indulgence in strong drink, in the hope of winning, for a moment, forgetfulness of their woes. It is to render them insensible to the restraining influence of shame, by pouring on mere misfortune the opprobrium that should have been reserved for crime. Such legislation has the further effect of preventing the precautions and alleviations which might be introduced to lessen the inconveniences of this irregular mode of life, in case it were tolerated by the authorities. All these evils, so lavishly dispensed by the laws, are the price that folly pays to gain an imaginary benefit—a benefit that, after all, has never yet been gained, nor ever will be.

The Empress-Queen of Hungary undertook to extirpate

this evil, and worked away with a perseverance directed by laudable motives, but worthy of a better cause. What followed? Corruption spread through public and private life; the marriage bed was violated; the seat of Justice was tainted. Adultery gained everything that libertinism had lost. Magistrates carried on a traffic in connivance: fraud, betrayal of trust, oppression, extortion, became rife in the land, and the evil which it was sought to abolish, driven underground, only became the more dangerous.

Laws  
against  
Prostitution—could.

Among the Greeks this calling was tolerated, sometimes even encouraged; but the parents themselves were not allowed to trade upon the honour of their daughters. Among the Romans, during what are known as the best days of the Republic, the laws were silent as to this form of irregularity. The saying of Cato to a youth whom he met coming out of a brothel is evidence of this fact: Cato was not the man to encourage any breach of the laws.

In the metropolis of the Christian world this vocation is openly pursued,<sup>1</sup> and to that circumstance we may, doubtless, ascribe in part the excessive rigour of the Protestants.

At Venice the calling of a courtesan is publicly recognized, and is scarcely regarded as dishonourable. In the capital of Holland, houses of ill-fame receive a licence from the magistrates.<sup>2</sup>

Rebif de la Bretonne published an ingenious work under the title of *Pornography*, in which he made proposals for the founding of a Government Institution (subject to certain regulations) for the reception and control of common prostitutes. In some respects, the toleration of this evil in large centres of population may prove useful; while prohibition is no good at all, and is even attended by special inconveniences.

<sup>1</sup> Written in 1782. This is not true at the present time (1820). It remains to be seen whether severity be beneficial to 'good manners' (Dumont's note).

<sup>2</sup> Some writers assert that eighteen brothels were authorized on the bankside in Southwark, and were there maintained until their suppression by Henry VIII. about 1546. (C. M. A.)

The hospital established in London for girls who wish to resume a life of chastity is certainly an excellent institution; but those who would treat prostitution with extreme rigour are not consistent with themselves when they approve such a charitable foundation. If some are reformed thereby, others are encouraged: is not the hospital at Chelsea an encouragement to soldiers, that at Greenwich to sailors!

Annuities  
for  
Prostitutes.

It would be well to institute annuities beginning at a certain age. The arrangements for purchasing such annuities would have to be adapted to the unfortunate position of these women, with whom the time of harvest is necessarily short, although on occasion the profits are considerable.

A very small beginning will serve to beget a spirit of economy, and, once aroused, it goes on constantly increasing. A sum too trifling to be employed with substantial benefit as present capital may yet yield a considerable annuity at some distant day.

Upon questions of morals, where moot points arise, it is well to consult the laws of various countries: in this way the mind, so to speak, goes on its travels. In the course of such a mental exercise we rid ourselves of local and national prejudices, by passing in review before our eyes the usages of other nations.

## CHAPTER XLVIII.

### PROBLEM III.

#### *To avoid furnishing Encouragements to Crime.*

To say that governments ought not to bestow rewards on crime, that they ought not to weaken the moral sanction or the religious sanction where either may be usefully employed, is a proposition which seems too plain to stand in need of proof. Yet it is often forgotten; and of this I could furnish some striking examples, but the more striking they are the less the necessity for dwelling upon them. It will be better to deal with those cases in which the maxim is set at naught in a less obvious manner.

(A) DETENTION OF PROPERTY, ETC., RESULTING IN PROFIT TO WRONG-DOER.—If the law suffers a man, who unjustly detains that which belongs to somebody else, to make a profit by delaying payment or restitution, as the case may be, the law becomes an accomplice in the wrong. There are countless instances in which the English law is defective in this respect. In many cases a debtor need only refuse payment until the time of his death, and thus defeat the discharge of the debt altogether; in many others he can by delays escape payment of interest; and in every case he may retain the capital for a time, and obtain, so to speak, a forced loan at the ordinary rate of interest.<sup>1</sup> This source of injustice would completely disappear if it were provided that—(a) So far as the civil liability of lands for the payment of debts is concerned, the death of one or other of the parties to the contract

The Law should make it impossible to profit by wrong-doing.

Unlawful detention of Property, resulting in profit to the Wrong-doer.

<sup>1</sup> Cf. *ante*, vol. ii., p. 73, note 2. (C. M. A.)

should make no difference;<sup>1</sup> ( $\beta$ ) interest should run from the moment when the obligation arises; ( $\gamma$ ) the obligation should arise at the time when the damage accrues, not at the time when the amount of damage is ascertained; ( $\delta$ ) the interest payable in respect of such an obligation should exceed the legal rate.

These expedients are very simple; how comes it that their adoption has not already been proposed? Those who ask the question fail to realize the influence of habit, indolence, indifference to the public welfare, and the bigotry of the law; not to mention personal interest and professional *esprit-de-corps*.

Unlawful  
Destruction.  
Insurance  
against  
Loss.

(B) UNLAWFUL DESTRUCTION.—When a man insures his property against any calamity, if the amount for which he is insured exceeds the value of the property covered by the policy, he has, in one sense, an interest in causing the calamity to come to pass: in setting fire to his house if it be insured against fire, in sinking his ship if it be insured against maritime risks.

The law which recognizes such contracts may, then, be regarded as furnishing a motive for the commission of crime.

Does it follow that the law ought to refuse its sanction? Not at all: but it does follow that it ought to prescribe or suggest, to those who grant the policies, precautions such as are best calculated to prevent these abuses, without being so restrictive as to hamper the assurers in the conduct of their business. For instance, the making of preliminary inquiries; the demand of certificates showing the real

<sup>1</sup> Sir S. Romilly on several occasions introduced a Bill to subject freehold estates to the payment of the simple contract debts of all deceased debtors. But Lords Eldon and Ellenborough always secured its defeat in the House of Lords. In the words of Lord Grey's 'Protest' on June 19, 1816: 'The injustice is the more flagrant in the case of a trustee who, having employed the money entrusted to him in the purchase of real estates, may transmit to his representatives the fruits of his violated trust; whilst the orphans or others, whom his conduct may have reduced to indigence, are left without remedy or resource.' The freehold and copyhold estates of every deceased debtor were ultimately made subject to such debts by 3 and 4 Wm. IV., c. 104. (C. M. A.)

value of the articles insured; in the event of loss by accident, requirement of the testimony of respectable persons as to the character and probity of the party insured; inspection, at any stage, of the articles insured, in case the suspicions of the assurers are aroused, etc. Such are a few of the measures that may be taken.

(C) TREASON.—If we permit the insurance of vessels belonging to the citizens of a hostile State, our own country will incur risks arising from two sources: (a) Facilities are afforded to the commerce of the hostile State, and that commerce is a factor in its strength; (β) to protect themselves against loss, the assurers may give to the enemy secret information as to the movements of our privateers and cruisers. As to the first suggested inconvenience, the mischief could only arise in case the enemy were unable to insure their vessels elsewhere, and could not employ their capital to the same advantage in some other branch of industry. As to the second suggested inconvenience, it really comes to nothing at all unless the assurers are in the way of giving the enemy some information that could not be purchased from anybody else, and at the same time their facilities for giving it are so complete as to lead them to disregard the danger and infamy of engaging in treasonable practices. So much, then, for the possible inconveniences.

Treason.  
Insurance  
of foreign  
Ships.

On the other hand, the advantage accruing to the nation granting insurances is beyond all question. In this kind of traffic it has been found that the balance of profit in a given time is on the side of the assurers; that is to say, taking the losses and gains together, they receive more in premiums than they pay out to satisfy claims for losses.

It is, then, a lucrative branch of commerce, and may be looked upon in the light of a tax levied upon the enemy.<sup>1</sup>

<sup>1</sup> After considerable conflict of opinion, the King's Bench held, in 1800, that it is illegal for a British subject to trade with an enemy without the King's licence. (C. M. A.)

Peculation.  
Contractors' Re-  
muneration  
based on  
aggregate  
Cost.

(D) **PECULATION.**—In making a bargain with architects and contractors, it is quite common to allow them so much per cent. upon the aggregate of the expenditure. This mode of payment, which seems natural enough, opens the door to peculation; and to peculation of a peculiarly disastrous character, for, in order that the speculator may make a small gain, his employer must needs suffer a heavy loss. This danger is at its greatest in the case of public works, when nobody has any special interest in checking waste; while many may procure additional profits by conniving at it.

One expedient for remedying the evil is to fix a sum based on an estimate of the probable cost, and to say to the contractor: 'Up to this amount you shall have so much per cent.; beyond this amount, your percentage will be nil. If you reduce the expenditure below the estimate, you shall still have your percentage as though upon the estimated sum.'

Pecuniary  
Interest in  
conflict  
with  
Public  
Duty.

(E) **ABUSE OF A TRUST CONFIDED BY THE SOVEREIGN POWER.**—If a statesman, who has it in his power to influence a decision to declare war or make peace, has received an employment of which the emoluments are larger in time of war than in time of peace, he has an interest to use his influence so as to secure the declaration or continuance of war. If these emoluments increase in proportion to the expenditure incurred in the war, it is to his interest that the war should be conducted with the greatest possible prodigality. It would, obviously, be much better if his interests tended in the contrary direction.

Wagers on  
the hap-  
pening of  
such events  
as are pro-  
hibited by  
Law.

(F) **OFFENCES OF ALL KINDS.**—When a man lays a wager, on the affirmative side, as to the happening of some future event, he has an interest in the happening of that event, proportioned to the amount of the wager. If the event in question is of the number of those prohibited by law, the man has then an interest in committing an offence. He is, indeed, urged on by a twofold stimulus.

There is a force partaking of the nature of reward, and a force partaking of the nature of punishment; the reward consisting in what he is to receive in case the event happens, the punishment consisting in what he has to pay if it does not occur. It is as though he had on the one hand been suborned by the promise of a sum of money, while on the other he had entered into an engagement under the sanction of an express penalty.<sup>1</sup>

Thus, if wagers of all kinds were, without distinction, recognized as valid, every species of venality would acquire a sort of legal acknowledgment, and everybody would be accorded the liberty of enlisting accomplices in any form of crime. On the other hand, if all wagers were, without restriction, rendered null and void, policies of insurance, which are so valuable an aid to commerce and so helpful in averting the effects of a thousand calamities, could no longer be issued; for insurance is really only a species of wager.

The middle course seems to be the best. In any case, where the wager may become an instrument of mischief, without serving any useful purpose, prohibit it absolutely. In cases where, as in insurance, the wager may prove of real service, allow it; but confer on the judge a discretion to make exceptions when necessary, on his finding that the wager has been made a cloak to cover subornation.

(G) REFLECTIVE OFFENCES, OR OFFENCES AGAINST ONESELF.—When a man is offered and accepts some office the tenure of which depends on submission to certain rules of conduct, and those rules of conduct are such as to be hurtful to himself without being productive of benefit to anybody else, the creation of the office has the effect of a law in direct conflict with the Principle of Utility—of a law enacted to add to the sum of pains and diminish the sum of pleasures.

Offences  
against  
oneself.  
Taking  
monastic  
vows.

<sup>1</sup> In the *Adventures of a Guinea*, a wager is made between the wife of a clergyman and the wife of a Minister of State that the clergyman would not be appointed to a bishopric. It is easy to guess who won the bet (Dumont). Charles Johnstone's novel of this name was published in London, 1760-65. (C. M. A.)

We may take as an illustration the institution of Monasteries in Catholic countries, or the remains of the monastic spirit still prevalent in the English universities. •

But it may be said that, inasmuch as no one enters into such a condition save by his own consent, the mischief is only of an imaginary kind. This answer would be complete if the obligation ceased so soon as the consent ceased; but the misfortune is that consent is the work of a moment, while the obligation is permanent. There is, it is true, another case in which a transitory consent is accepted as the warrant for lasting coercion; we refer to military enlistment. But, in that case, utility, or perhaps we should say necessity, serves as a justification. The State could not exist without an army; and the army could not exist if the individuals who compose it were at liberty to retire from it whenever they so pleased.

**Enlist-  
ment.**

## CHAPTER XLIX.

### PROBLEM IV.

*To increase the Responsibility in Proportion as the  
Temptation increases.*

THIS question mainly affects those who are engaged in the public service. The more they have to lose in point of fortune or honours, the greater our hold upon them. The salaries of responsible persons may be regarded as security for enforcing the discharge of any liabilities they may incur. In the event of malversation by them, the loss of salary is a penalty from which they cannot escape, even though they may succeed in evading every other form of punishment.

This expedient is specially applicable in the case of employments which involve the handling of public moneys. If you cannot otherwise assure the probity of a cashier, see to it that his salary shall slightly exceed the interest of the largest sum which is entrusted to him. This excess of salary may be regarded as a premium paid for an insurance against the consequences of his dishonesty: he has more to lose by being proved a rogue than by remaining an honest man.

Birth, honours, family connections, religion, may all serve as means for increasing responsibility—that is to say, as so many pledges for the good conduct of individuals. There have been instances of legislators refusing to put their trust in bachelors; they have looked upon a wife and children as hostages given by the citizen to his country.<sup>1</sup>

<sup>1</sup> 'He that hath wife and children hath given hostages to fortune; for they are impediments to great enterprises, either of virtue or mischief' (Bacon, *Of Marriage and Single Life*). (C. M. A.)

## CHAPTER L.

### PROBLEM V.

#### *To diminish the Sensibility to Temptation.*

Expedients  
to obviate  
Exposure  
to Tempta-  
tion.

IN the preceding chapter we were concerned with precautions against a man's dishonesty; in the present we are concerned with expedients for preserving the probity of an honest man, by guarding him from exposure to the influence of seducing motives that might lead him astray.

Let us deal first with salaries; for money may prove to be a poison or serve as an antidote, according to the mode of its application.

Quite apart from any question as to the happiness of individuals, the interests of the public service demand that the officials engaged therein should be relieved from the pressure of poverty, more particularly in such employments as afford opportunities of acquiring money by shifts and devices injurious to the citizens. In Russia, as a result of inadequate salaries, the most serious abuses have sprung up in every branch of administration. When we find that men, under the pressure of want, abuse their authority and become greedy of gold, thieves, and extortioners, the blame should be shared between them and the government which has spread, so to speak, a snare for their probity. Placed between the necessity of living and the impossibility of living honestly, they come to regard extortion as a lawful mode of supplementing their salaries, tacitly authorized by their employers.

Now, to place them beyond the temptation of poverty, will it be enough to supply their physical wants? No: if there be not a certain ratio or relation between the dignity with which a man is invested and his means of sustaining it, he is necessarily in a state of suffering and privation; because he cannot do what is expected of him, nor can he support himself in a position on a level with that of the society in which he is compelled to mix. In a word, wants increase with honours, and necessities, being relative, vary with one's condition in life. Confer high rank on a man without giving him the wherewithal to maintain his position, what will be the result? His dignity will furnish him with a motive for doing wrong; while his power will supply the means for so doing.

Crippled in his resources by the economy of Parliament, Charles II. sold himself to Louis XIV., who offered to find the money for his extravagances. The hope of freeing himself from the embarrassments in which he was plunged drove Charles, like any ordinary mortal overwhelmed with debt, into criminal courses. This wretched parsimony cost the English two wars, and a peace more disastrous than war itself. It must be allowed that it is by no means easy to say what sum of money would have been needed to act as an antiseptic, in the case of a Prince so corrupt as Charles; but this example is enough to show that the civil list of the Kings of England, which appears exorbitant to the common folk, is in the eyes of a man versed in affairs of State conducive to general security. Besides, by reason of the intimate alliance that subsists between wealth and power, everything which adds to the splendour of a dignified office adds also to the power attached to it; so that royal pomp, looked at from this point of view, may be likened to those architectural ornaments which serve the additional purpose of supporting and strengthening the structure.

This important rule, that the sensibility to temptation should be diminished so far as possible, has been violated

Salaries must be sufficient to support social Position of Recipients.

The English Civil List.

Cellibacy of the Clergy.

Celibacy of  
the Clergy  
—*contd.*

in the Catholic Church in a peculiarly flagrant manner. To impose celibacy on the priests, while entrusting them with the most delicate functions in relation to the probing of consciences and the direction of the family, was to place them in a very awkward situation: for they must either undergo the pain of observing a useless law, or incur the disgrace of violating it.

When, in a Council held at Rome, Gregory VII. declared that the clergy who were married or had concubines should no longer be permitted to say Mass, the assembled priests uttered cries of indignation, accused him of heresy, and, according to the historians of that period, announced that, if he persisted, they would rather abandon the priesthood than their wives: 'Let him,' they exclaimed, 'look for angels to govern the churches' (*Histoire de France*, par l'Abbé Millot; tom. i., Règne de Henri I.). In our days it has been proposed in France to allow priests to marry; but by this time no men were to be found amongst them—they were all angels.

## CHAPTER LI.

### PROBLEM VI.

*To strengthen the Impression of Punishments upon the Imagination.*

It is the real punishment which does all the evil; it is the apparent punishment which does all the good. We must therefore, so far as possible, diminish the former with a view to increasing the latter. Humanity is consistent with an appearance of cruelty.

Speak to the eyes, if you would move the heart. The precept is as old as Horace, and the experience which prompted it as old as the human race. Everyone feels its force, and tries to profit by it: the comedian, the quack, the orator, the priest, each and all know how to take advantage of the truth it conveys. Make, then, your punishments exemplary; give to the ceremonies that attend them a sort of mournful pomp; summon to your aid all the arts of imitation, and let representations of these important functions be among the first of the objects exhibited to the eyes of childhood.

A scaffold draped in black, that livery of woe—the officers of justice in funereal robes—the hangman's face concealed by a mask, which would serve at once to add to the terror of his appearance and to shield him from ill-founded indignation; emblems of his crime placed upon the culprit's head, so that those who witness his sufferings may learn for what offence he is called upon to endure them: such are some of the trappings that should accompany these tragedies of the law.<sup>1</sup> All the actors in this

<sup>1</sup> Public executions for felony were abolished in England in 1868 by 31 and 32 Vict., c. 24. (C. M. A.)

terrible drama might move in solemn procession, while sad religious music prepared the hearts of the auditors for the important lesson they were about to receive. And let not the judge deem it beneath his dignity to preside over this public spectacle, so that its gloomy pomp may be consecrated, as though by some priest of the Church. Reason should give the word of command; but imagination should carry the order into execution.

I would not reject valuable instruction, even though it were tendered by my most deadly enemy. The Vehmic Courts,<sup>1</sup> the Inquisition, the Star Chamber—I would consult them all, I would scrutinize and contrast all their methods: I would take possession of a diamond though it were covered with mud. Because assassins use a pistol to commit murder, may I not discharge one in self-defence?

Emblem-  
atic Pun-  
ishment.

The emblematic robes of the Inquisition might be usefully adopted in criminal jurisprudence. An incendiary wrapt in a cloak covered with a representation of flaming fires would display to every eye the image of his crime; and the indignation of the spectator would be associated with the idea of this particular offence.

A system of punishments, accompanied, so far as possible, by emblems appropriate to the various offences, would possess an additional advantage: it would furnish allusions for poets,<sup>2</sup> orators, dramatic authors, and for the purposes

<sup>1</sup> The Fehmio (or Vehmic) Courts were secret tribunals sitting in Germany from the end of the twelfth century to the middle of the sixteenth. The last regular court is said to have been held in Hanover in 1568; but courts of a similar type were held until the beginning of the nineteenth century. They originated in Westphalia, and were at first intended to afford protection against the lawlessness of the nobility. (C. M. A.)

<sup>2</sup> Cf. Juvenal's allusion to the punishment of parrioides:

*'Cujus supplicio non debuit una parari  
Simia, non serpens unus,'* etc. (Dumont.)

These verses occur in *Sat.* viii., 213, 214. The passage runs:

*'Libera si dentur populo suffragia, quis tam  
Perditus ut dubitet Senecam præferre Neroni?  
Cujus supplicio non debuit una parari  
Simia nec serpens unus nec culleus unus.  
Par Agamemnonidæ crimen, sed causa facit rem  
Dissimilem.'* (C. M. A.)

of common discourse. The ideas generated by these emblems would be reflected (so to speak) from a thousand objects, and would be spread in every direction.

Emblem-  
atic Pun-  
ishment—  
could.

The Catholic priesthood have well understood how to derive from this source aids for promoting the efficacy of their religious teaching. I remember having seen at Gravelines a striking exhibition. A priest was showing to the people a picture, displaying a crowd of unhappy creatures in the midst of flames; and one of them was making a sign, by stretching out his burning tongue, as though begging for a drop of water. It was a day appointed for public prayers for the release of souls from purgatory. Now, it is plain that such an exhibition would tend to instil, not so much a horror of crime as a horror of the poverty which precluded the poor wretch from obtaining redemption. The moral to be drawn was that a man should secure, by hook or by crook, the wherewithal to pay for a Mass; for, where every sin may be expiated by money, poverty is the greatest of all crimes, the only one of which the consequences cannot be escaped.

The ancients were no happier than the moderns in the choice of punishments; no design, no natural connection between the crime and the penalty. Everything has been left to caprice.

I have no wish to dwell upon a fact which has been long known to all those who are capable of reflection: it is that the forms of punishment which prevail in England are removed, as far as possible, from anything that could inspire respect. A capital execution is wholly wanting in solemnity; the pillory is sometimes a scene of mere buffoonery, at other times it is the occasion for an exhibition of popular cruelty—a game of chance in which the victim is exposed to the caprices of the crowd and the accidents of the day.<sup>1</sup> As to whipping, the weight of the lash depends on the impression made by the coin of

Defects in  
forms of  
Punish-  
ment in  
England.

<sup>1</sup> Cf. *ante*, vol. ii., pp. 148, 162. (C. M. A.)

the culprit on the palm of the man appointed to execute the sentence; while branding on the hand is sometimes inflicted with a cold iron, sometimes with a hot one—this turns on the understanding entered into between the official and the criminal. If a hot iron be used, it is only a slice of ham that is burnt; but, to complete the farce, as the fat frizzles and smokes, the culprit utters piercing shrieks of agony. The onlookers, who know the whole game, only laugh at this parody of justice.<sup>1</sup>

Objection  
to realistic  
Punish-  
ments an-  
swered.

But perhaps it may be said—for there are two sides to every question—that such realistic representations, such terrible spectacles of penal justice, would spread dismay among the people and create dangerous impressions. I do not think so. Even if they suggested to dishonest folk the idea of danger, they would present to those who were honest the idea of security. When, for indefinite and undefinable offences, we threaten eternal punishment, and, with every circumstance of terror, picture the flames of hell, we may fire the imagination and induce madness. But here we do nothing of the kind; we assume a palpable proved offence, an offence which no one need commit unless he chooses, so that the dread of punishment cannot be inflamed to a dangerous degree. We must, however, take care not to create, or foster in the mind, any association with false or dangerous notions.

In the first edition of the Code Teresa, the portrait of the Empress was surrounded by medallions representing gibbets, fetters, wheels, racks, manacles, and other instruments of punishment. What a blunder to present the image of the Sovereign with these hideous emblems, like the head of grim Medusa shaking her serpents! This obnoxious frontispiece was suppressed; but an engraving representing the various instruments of torture was allowed to remain—a picture of ill-omen on which no one could gaze without saying to himself: ‘Such are the evils to

<sup>1</sup> Cf. note, *ante*, vol. ii., p. 159. (C. M. A.)

which I may be exposed, though I be innocent of all offence.' But if an abridgment of the penal code were accompanied by prints representing the characteristic penalties attached to the various crimes, it would serve as an imposing commentary, a sensible and speaking image of the law. Everyone who looked on the prints would say: 'Such is my doom if I commit crime.' We thus see how, in matters of legislation, the slightest interval may separate the harmful from the beneficial.

## CHAPTER LII.

### PROBLEM VII.

#### *To facilitate Knowledge of the Fact of an Offence.<sup>1</sup>*

Fact of  
Offence.  
Identity of  
Offender.

IN penal matters, there are two points as to which the judge must be informed before he can discharge his functions: the fact of the offence, and the identity of the offender. These two points being determined, his information is complete. The obscurity which enshrouds the two points varies in degree, and is dependent on the circumstances of each particular case; sometimes it is greater as to the first, sometimes as to the second. We are concerned in the following Articles with the *fact of the offence*, and the means which are calculated to facilitate its discovery.<sup>2</sup>

Expedients  
for facilita-  
ting Dis-  
covery of  
Offences.

#### ARTICLE I.: *Require Documentary Evidence.*

Documen-  
tary Evi-  
dence.  
*Littera  
scripta  
manet.*

It is only by means of the written word that we can secure permanent and authentic testimony. Oral transactions at any rate, unless they are of the simplest kind, will be subject to endless disputes: *Littera scripta manet*. Mahomet himself recommended his followers to observe this precaution. It is almost the only passage in the Koran which displays a gleam of common-sense (chapter on the Cow).

<sup>1</sup> *Corpus delicti* is a technical expression of Roman law. To facilitate knowledge of the *corps de délit* is, in other words, to render the fact of the offence more easy of discovery (Dumont).

<sup>2</sup> Many of the topics referred to in this chapter are dealt with in detail in bk. iv. of the *Rationale of Evidence* ('Of Presupponted Evidence,' Bowring, vol. vi., p. 508). (C. M. A.)

ARTICLE II.: *Cause the Names of the Witnesses to be  
• attested on the Face of the Deed.*

It is one thing to require that there should be witnesses <sup>Attestation of Deeds.</sup> to the execution of a deed, and another thing to require that their presence be notified, attested, and registered, on the face of the deed. A third precaution is to append a note of the facts and circumstances, such as will enable the witnesses to be found if they are wanted.

In the attestation of deeds, it will also be found useful <sup>Formalities to be observed.</sup> to observe the following additional precautions: (a) Prefer a large number of witnesses to a small number. This will reduce the danger of treachery, and give a better chance of finding witnesses if they are wanted. (β) Prefer married people to single ones; heads of families to servants; persons known to the public rather than less distinguished individuals; youths or men in the flower of their age rather than the old and infirm; persons with whom you are acquainted rather than such as are unknown to you. (γ) When the deed comprises many leaves or sheets, each leaf or sheet should be subscribed by the witnesses. If there be any corrections or erasures, a separate list ought to be made of them, and such list attested; the lines ought to be counted, and the number on each page indicated. (δ) Let each witness add to his Christian name and surname, if he be asked to do so, his description, place of abode, age, whether married or single. (ε) Let the time and place of the execution of the deed be minutely specified; the time, not only by the day, month, and year, but also by the hour; the place by the district and parish, even by the description of the house and the name of the present occupant. This provision is of great service in the prevention of forgery: a man would be afraid of embarking on such an enterprise if it were necessary to acquaint himself with, or commit himself to, so many details before inserting a date in the forged deed; and, if

he were emboldened to make the attempt, he would be the more readily discovered. (§) Numbers should be expressed in words, not in figures—especially dates and amounts, save that, in mere matters of account, it is enough to give the aggregate amount in words, and, when the same date or sum is constantly referred to in the deed, it is not necessary to repeat it in words. The reason for this precaution is that figures, unless written with great care, are liable to be taken one for another; while it is easy to alter them, and the slightest alteration may have important consequences. The number 100 may very readily be converted into the number 1,000. (η) The formalities to be observed on the execution of a deed ought to be set out in the margin of one of the sheets of paper or parchment.

No Formality  
should be  
absolutely  
essential.

Should these formalities be left to the discretion of individuals, as being mere expedients dictated by prudence in the interests of security, or should they be rendered obligatory? Some should be obligatory, others not so; and, even as to those which are obligatory, latitude should be allowed to the judges, so as to enable them to deal specially with a case in which strict compliance with the formalities was impossible. It may well happen that a deed has to be executed where the prescribed kind of paper cannot be procured, where the requisite number of witnesses are not to be found, etc. In such circumstances the deed might be declared valid provisionally, until such time as the necessary requirements could be fulfilled.

The case  
of Wills.

Greater latitude should be conceded in the case of wills than in the case of deeds made between living parties. Death waits neither for lawyers nor for witnesses; and men are apt to delay the making of a will until the day comes when there is no longer time or opportunity for correcting and revising. On the other hand, documents of this kind require more precautionary safeguards than any others, because they are more subject to the influences

of fraud and imposture. In the case of a deed between living parties, the party, whom some rogue has sought to fix with an obligation not in fact incurred, may chance to be alive and ready to give the knave the lie, but in the case of a will there is no such possibility.

To pronounce definitely on the rules that should be laid down and the exceptions that should be allowed would involve a long and detailed investigation. I will only remark that I cannot conceive any formality, even the simplest, the omission of which ought to render a deed necessarily and absolutely invalid.

If such instructions as I have suggested were promulgated by the government, although not declared to be strictly obligatory, everyone would be disposed to comply with them; because, in a deed executed in good faith, everyone wishes to obtain for himself all the security that is possible. The omission of such formalities would therefore afford cogent ground for suspecting fraud; unless, indeed, it were clear that the omission must be assigned either to the ignorance of the parties or to circumstances which rendered observance of the formalities impracticable.

*Instructions, though not obligatory, would be generally obeyed.*

### ARTICLE III.: *Establish Registries for the Preservation of Titles.*<sup>1</sup>

Why ought deeds to be registered? What deeds ought to be registered? Ought the registers to be secret or open to public inspection? Ought registration to be optional, or should an omission to register expose the defaulter to a penalty?

*Establishment of Registries.*

<sup>1</sup> The references in this Article are, apparently, to the registration of deeds and assurances, as distinguished from the registration of titles. In 1830 the Real Property Commissioners recommended a general registry of deeds, and in 1857 a Royal Commission reported in favour of a general registration of title. See note 2, *post*, p. 242. Under the 'Little' or 'Barebones' Parliament of 1653, a Committee on Law Reform had proposed to set up a universal Register of Titles, in which every charge or conveyance relating to land should be entered (*cf.* Jenks's *Short History of English Law*, p. 181). (C. M. A.)

Registers will prove useful against—(α) The fabrication of forged deeds; (β) the falsification of deeds; (γ) accidents resulting in the loss or destruction of the original documents; (δ) two transfers of the same property to different purchasers.

For the first and last of these objects a simple memorial would be enough; for the second an exact copy would be essential; for the third an abstract would be enough, but a complete copy would be better.

When  
Registration  
must  
be obliga-  
tory.

Against the fabrication of forged deeds, registration would only be useful if it were made obligatory; an unregistered deed being treated as a nullity, with some reservation to meet cases of accident. The advantage resulting from this arrangement is that, after the expiry of the period allowed for registration, the fabrication of a deed, which, according to the date on the face of it, ought to be already registered, would of necessity prove futile. The requirement amounts to fixing a short limit within which a fraud of this nature could be committed with any possibility of success; and, at a date so near the date borne by the forged deed, evidence of the fraud would almost certainly be forthcoming.

So, too, where the object of the registration is to prevent two transfers of the same property to different purchasers, the registration must be obligatory, an unregistered deed being treated as a nullity. Such a case may well arise when land is transferred by way of mortgage; and, in the absence of an obligatory clause, registration would probably not take place, as neither party would have any interest in seeing to it. Indeed, the transferor has an interest the other way. Although an honest man, he may well dislike to make it known that he has sold or encumbered his property; while a rogue may be anxious to secure an opportunity of being paid twice over.

The case of  
Wills.

Of all kinds of formal documents, wills are exposed to the gravest risk of forgery. The most effective protection

against a fraud of this nature is to require registration during the lifetime of the testator, under pain of nullity. It may be objected that such a requirement might place a dying man at the mercy of those who surrounded him in his last moments, since he would no longer possess the power to reward or punish by altering his will; but this inconvenience might be obviated by reserving to him the right of disposing of a tenth part of his property by a codicil.

What deeds ought to be registered? All those in which a third person may acquire any interest, provided that they are of sufficient importance to justify the precaution.

What  
Deeds  
should be  
registered?

Of what deeds should the registration be secret? of what public? Deeds between living parties in which third persons are interested. mortgages. and marriage settlements, should be publicly registered. As to wills, profound secrecy should be observed during the life of the testator. Deeds such as bonds, articles of apprenticeship, and marriage settlements which do not bind real property, might be kept secret, subject to the condition that their contents should be communicated to any person who could establish a special claim to inspect them.

When  
should the  
Register be  
open to  
public in-  
spection?

The Registry Office ought therefore to be divided into separate departments—secret or public optional or obligatory. Optional registrations would be numerous if the charges were reasonable. Prudence dictates the keeping of copies in case of accident; and where could copies be more securely lodged than in a repository of this description?

The necessity of registering deeds, which charge landed property by way of mortgage, would operate, in some sort, as a check upon prodigality. A man could not, without a certain degree of shame, borrow money on his estate for the mere purpose of spending it on his own amusements. And yet this very consideration, so favourable to the introduction of the measure, has been looked upon as an objection to it, and has, indeed, prevented its adoption.

Registration  
would  
tend to  
check  
Prodi-  
gality.

Adoption  
of the  
Expedient  
in various  
Countries.

This plan of registration has been recognized, to a greater or less extent, by the jurisprudence of several countries.<sup>1</sup>

The French lawyers seem to have hit upon a fairly happy mean.

In England the law varies. The counties of Middlesex and York possess registries, established in the reign of Queen Anne and intended mainly to prevent double transfers. These registries have produced such an excellent effect that the value of land is higher in those two counties than elsewhere: how comes it that, after so decisive an experience, the plan has not been generally adopted?<sup>2</sup>

Ireland already enjoys this advantage, but it is left to the free choice of individuals to register or not, as they may see fit. The system has, too, obtained a footing in Scotland, where wills must be registered before the death of the testator. In the county of Middlesex the registration of a will is not obligatory until after the death of the testator.

#### ARTICLE IV.: *A Plan for preventing the Forgery of Deeds.*

Require-  
ment of use  
of special  
Paper or  
Parchment.

There is an expedient which would in some measure take the place of registration. It might be made obligatory to use, for the deed in question, a special sort of paper or parchment; and those who sell this commodity by retail might be prohibited from supplying it without indorsing thereon the year and the day of sale, together with the names of the

<sup>1</sup> 'The land registries which have the highest commendation from juridical writers are those of certain small Teutonic communities—e.g., the State of Hesse-Darmstadt and the Swiss canton of Zurich' (Maine's *Early Law and Customs*, p. 353). (C. M. A.)

<sup>2</sup> The statutes of Anne and Geo. II., relating to the ridings of Yorkshire, were repealed by the Yorkshire Registries Act, 1884 (47 and 48 Vict., c. 54), which consolidated and amended the law. The statute 7 Anne, c. 20, relating to Middlesex, is still in force, subject to many amendments and restrictions. And see now the general Acts bearing on Land Transfer passed in 1875 and 1897 (38 and 39 Vict., c. 87; 60 and 61 Vict., c. 65), etc. Registration of title is, under the Act of 1897, required in the County of London, which has been prescribed as a 'compulsory area'; but in England generally registration of title is still voluntary. (C. M. A.)

seller and of the purchaser. The right to dispose of the paper or parchment might be confined to a certain limited number of persons, of whom a list should be kept. The account-books of these persons would then become veritable registers, and might after their death be deposited in some public office. This precaution would prevent the forgery of any kind of deed purporting to have been made at a distant date.

It would operate as a further check if the paper were required to bear the same date as the deed itself. The date of the paper might be ingrained in its texture, in the same way as the name of the manufacturer; and if this were done, no deed could be forged successfully without the connivance of the paper-maker.

ARTICLE V.: *Establish Registries for Events which serve to establish Titles.*

Nothing much need be said as to the manifest necessity for preserving evidence to establish the fact of a birth or of a burial. A prohibition against the interment of a dead body without previous inspection by an officer of police operates as a general precaution against assassination. It is strange that in England marriages, instead of being recorded in writing, were for a long time left to the mere notoriety of a transitory ceremony. The only reason one can assign is the simplicity of the marriage contract, which is the same for all save as to any special arrangements for the settlement of property. Happily, during the reign of William III. these events, which serve as the root of so many titles, suggested themselves as suitable objects for taxation. It thus became necessary to compel their registration. We have, fortunately, got rid of the burden of the tax, but the advantage of registration remains.<sup>1</sup>

Establishment of Registries for Births, Marriages, and Deaths.

<sup>1</sup> Cf. 'Constitutional Code,' book ii., chap. xxvi. (Bowring, vol. ix., p. 625 & seq.). Bentham's views were adopted in the Births and Deaths Registration Act of 1836. (C. M. A.)

Yet, even nowadays, the security afforded to rights which depend upon a marriage is neither so absolute nor so general as it ought to be. For example, there is only a single entry of the marriage: the register of each parish ought to be copied and recorded in some central office. Again, in the Marriage Act of George II., whether through neglect or intolerance, the benefit of this requirement was denied to Jews and Quakers.

ARTICLE VI.: *Put the People on their Guard against Divers Offences.*

Notifica-  
tion as a  
Precaution  
against  
certain  
Offences.  
Poisoning.

(a) *Against Poisoning.*—Give instruction as to the various substances which may be employed as poisons, explaining the means by which their use may be detected and the methods of counteracting their effects. If such instructions were spread broadcast among the multitude, they might do more harm than good. This is one of the rare cases in which knowledge is more dangerous than helpful; the modes in which poisons may be administered are more definitely ascertained than the methods available to counteract them. A safe middle course would be to confine the circulation of such instructions to the class of persons who could make a good use of them—persons whose condition, character, and education, would afford a guarantee against the risk of abuse; as, for example, the parochial clergy and medical practitioners. Keeping the object of safety steadily in view, these instructions should be printed in the Latin tongue, with which educated men are supposed to be acquainted.

But, in regard to such poisons as come to hand without a search, and may well be administered in complete ignorance of their dangerous character, a knowledge of their appearance and effects should be made as general as possible. Hemlock, which is so readily mistaken for parsley, and copper, which is so commonly found dissolved in certain

vessels when the tin is worn, must be administered far oftener by accident than by design; unless, indeed, there be some strange depravity in the character of the nation at large. In such cases we have more to hope than to fear from the communication of knowledge, however dangerous it may appear.

(β) *Against False Weights and Measures.*—Give instructions as to false weights and measures, and as to false standards of quality; explain also the various deceptive devices that may be made use of, even when true weights and measures are employed. In this connection we may refer to scales with unequal arms, measures with double bottoms, etc. These branches of knowledge cannot be too widely diffused. Every shop should display such instructions, as a pledge of fair dealing.

False  
Weights  
and  
Measures.

(γ) *Against Frauds in Relation to Money.*—Give instructions informing the people how to distinguish good money from bad. If any particular kind of false coin makes its appearance, the government ought at once to give notice of the fact, in the most public fashion. At Vienna, whenever any counterfeit coins are known to have been uttered, the mint authorities never fail to notify the circumstance forthwith; but the currency is there upon such an excellent footing that attempts to pass bad money are of rare occurrence.

Frauds as  
to the  
Coinage.

(δ) *Against Cheating at Play.*—Give instructions as to loaded dice, as to devices for cheating in the manipulation of cards, the giving of signals by confederates, the placing of accomplices amongst the spectators, etc. These instructions might be hung in all places of public resort, and presented in such a manner as to put youths upon their guard, and at the same time exhibit the vice of gambling in a ridiculous and odious light. It would be well to offer a reward to such as reveal the secret of any new tricks invented by sharpers.

Cheating at  
Play.

(ε) *Against Begging Impostors.*—Some mendicants, although in perfect health, counterfeit disease; others inflict a slight injury on themselves that they may present the appearance of suffering from some very disgusting

Begging.

Begging—  
contd.

ailment; others, again, relate lying stories of shipwrecks, fires, and the like; while there are some who borrow or steal children, whom they make use of as instruments of their trade. Instructions on these points should be accompanied by a note of warning, which would prevent the knowledge of so many impostures hardening people's hearts and rendering them callous to real misery. In a country well-regulated as to its police administration, a beggar who presents himself in a truly pitiful guise ought to be neither neglected nor left to himself; it should be the duty of the first person who comes across him to consign him to the hands of public charity. Instructions such as these would provide the people with a homily more entertaining than any controversial discourse.

Theft,  
Swindling,  
etc.

(5) *Against Theft, Swindling, and obtaining Money by False Pretences.*—Give instructions which disclose some of the many methods employed by thieves and swindlers. There are a number of books on this subject, containing materials supplied by malefactors who had repented them of their iniquities, or hoped to secure a pardon by voluntary confession. These compilations are, speaking generally, wretched productions; but useful extracts may be made from them. One of the best is, *The Discoveries and Revelations of Poulter, alias Baxter*, which passed through sixteen editions in the space of twenty-six years. This circumstance shows how wide would be the circulation of an authentic work of this kind, published under government authority. A tone might be given to the book such as would make it inculcate sound moral lessons, while it still remained an amusing story.<sup>1</sup>

Religious  
Impostures.  
Witchcraft.

(7) *Against Religious Impostures.*—Give instructions as to crimes committed under the influence of superstitious

<sup>1</sup> The oldest book I know on the subject is Clavell's *Recantation*. The second edition bears date 1628. It is in verse. Clavell was a man of family, who became a highwayman and secured a pardon. It is stated in the title-page that the book was published by the express command of the King (Charles I.). One of the more modern works is entitled *A View of Society and Manners in High and Low Life*, by Parker (Dumont).

beliefs, entertained as to the malice and power of spiritual agents. The number of such crimes is only too great; but they are as naught compared with the legal persecutions which have originated in these same beliefs. There is scarcely a nation in Christendom that has not cause to reproach itself with bloody tragedies arising from a belief in witchcraft. A history of crimes committed under the influence of superstition would prove very instructive as a homily to be read in the churches; but, as to the legal persecutions, there is no need to give them a melancholy publicity. The views of so many upright and revered judges, who have proved themselves to be the pitiful dupes of a debasing superstition, would be more likely to confirm the people in error than to disabuse their minds. It is much to be wished that we could rid ourselves of the witch of Endor. I do not know what evil deeds this Jewish Canidia<sup>1</sup> may have done in Palestine; but it is certain that throughout Europe she has wrought a terrible amount of mischief. The most learned theologians have taken great exception to the story, at any rate when accepted literally.

English jurisprudence has the honour of having been the first to reject, in express terms, from its penal code the pretended crime of witchcraft. In the Code Teresa, though compiled in 1773, it makes a considerable figure.

ARTICLE VII.: *Publish a Price List of Articles of Merchandise as a Hindrance to Extortion.*

Though the exaction of an exorbitant price cannot properly be treated as an offence and subjected to a penalty, we may, at any rate, regard it in the light of a mischievous act, which it would be well to prevent, if we can do so without

<sup>1</sup> Canidia (Gratidia), a Neapolitan courtesan, was assailed by Horace as a sorceress, after she had deserted him.

‘Vidi egomet nigra succinctam vadere palla

Canidiam, pedibus nudis, passoque capillo,

‘Cum Sagana majore ululante.’

Serm. I. (viii.), 23-25. And see Epod. 3, 8; 5, 15; Serm. II., 1, 48; 8, 95. (C. M. A.)

Witch-  
craft—  
cond.

Lists of  
Prices to  
prevent  
Extortion

causing some greater mischief. A direct penalty being inadmissible, we must have recourse to some indirect expedient. Happily, this is a sort of offence of which the evil, so far from being increased, is actually diminished by adding to the number of offenders. What, then, can the law do? It can add to the number, as far as possible. Let us explain this apparent anomaly. Such or such an article is selling very dear; the profit yielded is enormous. Spread this information far and wide; sellers will rush in from all quarters, and, by the mere effect of competition, the price will be lowered.

Usury is  
commercial  
Extortion.

Usury may be ranged under the head of commercial extortion. To lend money is to sell money in hand for money to be paid hereafter. The date of payment may be fixed or it may be undetermined; it may be dependent on certain future events or it may be left quite open. So, too, the payment may take the form of a lump sum paid at one time, or the debt may be discharged by instalments falling due from time to time, etc. It, you make usury unlawful, and thereby increase the lender's risk, he will negotiate the loan with you in secret, but will, of course, demand a higher rate of interest.

#### ARTICLE VIII.: *Publish Lists of Official Fees, Dues, and Tolls.*

Publica-  
tion of  
official  
Fees, Dues,  
and Tolls.

There are almost always certain fees or dues attached to the services rendered by government departments. These fees constitute a part of the salaries of the officials employed. As in the case of an artisan disposing of his handiwork, so a public officer is inclined to sell his services for as much as he can get. But, in respect to ordinary labour, competition and the opportunity of going to other markets serve to check this tendency, and restrain it within reasonable limits; whereas, when, a public office is established, there is no competition whatsoever, because the right of disposing

of the particular kind of service becomes a monopoly in the hands of the official. Once leave the price to the discretion of the seller, and it will soon have no other limit than such as is proscribed by the needs and necessities of the purchaser. The fees and dues payable to the servants engaged in public departments ought, then, to be fixed by the laws with the utmost precision.<sup>1</sup> If this be not done, any extortion which takes place should be imputed rather to the negligence of the legislator than to the rapacity of the official.

ARTICLE IX.: *Publish all Accounts in which the Nation is interested.*

When accounts are rendered at certain stated periods, and the auditors, limited in number, are perhaps chosen or influenced by the accounting party, while no one is afterwards called in to check or control their work, the most serious mistakes may escape notice or be passed over without correction. But when accounts are made public, neither witnesses nor critics nor judges will be wanting.

Publica-  
tion of  
National  
Accounts.

Each item is then examined. Was this article necessary? Was it really needed, or was it merely a pretext for spending money? Is not the public supplied at a dearer rate than private individuals? Have not the interests of the contractor been preferred to the interests of the State? Has not some advantage been secretly given to a favoured person? Has nothing been allowed him under false pretences? Have not intrigues been resorted to for the purpose of ousting competitors? Has not something in the accounts been kept back? A hundred questions may be put containing suggestions of the like

<sup>1</sup> *E.g.*, in municipal boroughs the town clerk is required to post a table of fees, authorized to be taken by the justices' clerk, in the room where the justices sit (45 and 46 Vict., c. 50, s. 234); and in the Metropolis a table of fees must be fixed in some conspicuous part of each court (2 and 3 Vict., c. 71, s. 43). (C. M. A.)

Publication  
of National  
Expend-  
iture.

nature, that can never be cleared up satisfactorily unless the accounts be open to the public eye. In any special committee of investigation, some members may lack honesty, others may lack knowledge; a mind slow in its movements will pass over anything it fails to grasp, for fear of displaying its want of alertness; a lively understanding will not condescend to study detail; everyone leaves to his fellows the trouble of investigation. But all the qualities wanting in a small body of men will be found to be possessed by the general public. In that heterogeneous and discordant mass the worst principles, as well as the best, may lead to the desired goal; envy, hatred, and malice, may serve in the stead of public intelligence, and these same passions, being more active and persistent, will make a closer scrutiny in every direction, and complete the investigation with a more scrupulous care.

I think only two exceptions should be allowed—one connected with the expense of publication, the other with the secret service. It would be idle to publish the accounts of a small parish, because the original documents are readily accessible to everyone interested in their examination; while if we were to make public the mode in which sums destined for use in the secret service were applied, we should lose all chance of obtaining information as to the enemy's plans.

#### ARTICLE X.: *Establish Standards of Quantity—i.e., Weights and Measures.*

Establish-  
ment of  
Standards  
of Quan-  
tity.

Weights indicate the quantity of matter; measures, the quantity of space. They are of use in satisfying a man as to the quantity of anything of which he stands in need; in the settlement of disputes; and in the prevention of frauds.

To establish uniformity throughout a given State has been an object of many Sovereigns. To find a common and universal measure for all nations has been an object

of research for many philosophers; and at the present time the French Government are bestirring themselves in the matter. This is indeed an honourable undertaking; for what can be rarer or more gratifying than to find a government working at one of the foundations necessary to secure the establishment of uniformity among the nations of the world ?

To demonstrate the utility of uniformity in weights and measures under the same government, and for a people who, in other respects, speak the same tongue, is a task which does not seem to involve the need for much argument.

A measure, to a man who does not know its valuation, is no measure at all.

If the measures of two towns differ either in name or in quantity, the two communities cannot trade together without great risk of difficulties and mistake. In this connection, each place is foreign to the other. The nominal price of two commodities may be the same; but if the modes of measurement differ, the actual price is not the same. Thus, unremitting vigilance becomes absolutely necessary; distrust hampers the course of business; mistakes creep into transactions conducted in perfect good faith; while fraud may lie concealed under the confusion occasioned by the varying denominations of quantity. Now, to produce uniformity there are two expedients: First, to fix standards by public authority, send measures into every district, and forbid the use of any other measure; secondly, to fix standards, but not render their adoption compulsory. I do not know of any instance of the application of the first expedient;<sup>1</sup> the second has been applied with success in Tuscany by the Archduke Leopold.

In England there are no less than thirteen Acts of

<sup>1</sup> In Bowring's edition of Bentham's Works (vol. i., p. 555), it is stated, that the first method had then (1859) been adopted in England. The reference is, apparently, to the Weights and Measures Act, 1835 (5 and 6 Wm. IV., c. 63), which was repealed by the Act of 1878, still in force. (C. M. A.)

Standards  
of Quantity  
—*contd.*

Parliament dealing with this subject, and a thousand more, on the same lines, might be passed without any resulting success; because the clauses which compel conformity with the standard are not stringent enough, and, moreover, there is no provision for the manufacture and distribution of standards. A few have been scattered here and there, but the matter has been left to chance. We must begin by supplying each trade or community with a legal standard, and then a penalty might be imposed on every workman who made weights and measures not in conformity with the standard; while transactions might be declared null and void if other than the standard weights and measures were employed. But probably the last expedient would not be found necessary; the first two would suffice.

As between different nations, a lack of uniformity in this regard would not lead to so many mistakes, because the mere difference in language is enough to put everyone upon his guard. There would, however, result considerable embarrassment in commercial transactions; and fraud, when favoured by a strange tongue and strange denominations, will often succeed in taking advantage of the ignorance of a purchaser.

The case of  
medicines.

An inconvenience, not so widely felt but in no wise less important, attends the administration of medicines. Unless the weights are precisely similar (especially in the case of those drugs of which the most minute quantity may form an essential ingredient), the pharmacopœia of one country will prove of very little use in another and may, indeed, involve practitioners in the risk of fatal error. We thus see how considerable difficulty may be placed in the way of the free communication of scientific knowledge; and a like inconvenience is felt in the development of other arts dependent for success on the observance of delicate shades and proportions.

ARTICLE XI.: *Establish Standards of Quality.*

If it were our purpose to mention all the steps that a government would have to take in order to set up the most suitable *criteria* of quality and value, in respect of a great number of objects, each susceptible of various tests, we should be compelled to enter into a considerable amount of detail. The touchstone furnishes a test, however imperfect, of the quality and value of metallic compositions, intermixed with gold and silver. The hydrometer affords an infallible test in so far as identity of quality bears a direct ratio to identity of specific gravity.

Establishment of Standards of Quality.

The sophistications which it is most important for us to be able to detect are such as may result in injury to health—as, *e.g.*, the mixture of chalk and burnt bones with flour intended for the making of bread; lead used to take away the acidity from wine, or arsenic used to refine it. Chemistry supplies means for the detection of all these adulterations; but some scientific knowledge is necessary for their application.

The interference of government in such matters may well be confined to three objects: (a) To discover the means of testing in cases where they are as yet unknown; (β) to spread among the public at large a knowledge of the various recognised expedients; (γ) to prescribe the procedure to be adopted by the government officials charged to fulfil the foregoing functions.

Limits of Government Interference.

ARTICLE XII.: *Institute Stamps or Marks for attesting the Quantity or Quality of such Wares as ought to conform with some Particular Standard.*

Marks, so designed, are really declarations or certificates in an abridged form; and in their preparation five points should be considered: (i.) The purpose to be served; (ii.) the person who should purport to attest their genuineness; (iii.) the

Branding or stamping to attest Quantity or Quality.

Purposes  
for which  
such  
Brands,  
etc., are  
applied.

nature of the information they should convey and the amount of detail to be supplied; (iv.) the visibility and intelligibility of the mark; (v.) its permanence and indestructibility.

The utility of authentic attestations of this character is beyond all manner of dispute. They have been successfully employed for the following purposes:

(a) To give assurance to rights of property. So far as concerns private individuals, we may trust to their own prudence to make use of this precaution; but in regard to public property or articles placed on deposit its employment should be made a matter of legal obligation. Thus, in England, everything which belongs to the royal navy bears a special mark, which it is unlawful to use in the merchant service. In the royal arsenals the impress of an arrow is stamped on timber intended for constructive purposes; while there is run through the cordage a particular thread which private persons are forbidden to employ.

(β) To assure, for the benefit of purchasers, the quality or quantity of certain articles of commerce. Thus, under the statute law of England, marks are affixed to many mercantile and trading objects—as, *e.g.*, blocks of wood exposed for sale, leather, bread, tin, silver-plate, coins, woollen stuffs, stockings, etc.

(γ) To insure the payment of taxes. If the article subject to taxation does not bear the mark in question, its absence affords proof that the tax has not been paid. Countless examples might be given.<sup>1</sup>

(δ) To insure obedience to the laws which prohibit importation.

<sup>1</sup> Chocolate, tea, hops, letters, newspapers, soap, playing-cards, almanacks, hackney-coaches, foreign silks, legal documents, etc. (Dumont).

## CHAPTER LIII.

### PROBLEM VIII.

*To prevent Offences by making it the Interest of Many Persons to prevent them.*

I PROPOSE to give an illustration which might as well have been referred to the last head as to this one; for the particular offence has been prevented—it may be by increasing the difficulty of concealment, or it may be by giving many persons an interest in preventing it. Plan by which Delays in the Postal Service were obviated.

The service of post letters in England had always been wanting in despatch and punctuality. The carriers indulged in such delays as pleasure or profit might suggest to them, while the tavern-keepers made no attempt to speed their parting guests. Now, all these delays were so many small offences—breaches of official regulations. But what could the legislator do to effect a remedy? The work of surveillance soon grows wearisome; greater laxity prevails in the enforcement of penalties; the laying of informations, always a troublesome and odious task, becomes by degrees less frequent; and it is not long before the irregularities, suspended for a while, resume their ordinary course.

A very simple plan was devised; it involved neither law, nor penalties, nor informations, and was better than all of them put together. The expedient consisted in a combination of the work of two establishments which had theretofore been distinct—the carriage of the mails and the conveyance of passengers. Complete success has attended this project: celerity of despatch has been increased twofold,

Delays in  
the Postal  
Service—  
could.

and travellers have enjoyed an improved service. The plan is worthy of considered analysis.

The travellers, who accompany the letter-carrier, have become so many inspectors of his conduct; he has no means of escaping their observation. Their praises, and the gratuities that he hopes to receive from them, act as an incentive to him; while at the same time he cannot fail to realize that, if he is beguiled into wasting time, these same travellers will have a natural interest in making complaints, and may well lay informations without being paid for so doing and without incurring any of the odium which attaches to an informer. Now, mark the advantages of this happy combination! Witnesses at hand to note every act of misconduct, howsoever slight—the motive of reward substituted for the fear of punishment—the saving of informations and legal proceedings—the infliction of penalties become a rare necessity—and the two services, by being blended into one, rendered better, quicker, and cheaper.

I record this happy notion of Mr. Palmer's as a study in Legislation.<sup>1</sup> We must ponder what has been accomplished successfully in one direction, to learn how to overcome the difficulties that arise in another. Careful research into the causes that conduced to this successful reform will lead us to the perception of rules of general applicability.

<sup>1</sup> A somewhat similar device has been adopted in India. Punitive police have been billeted in districts where crime was widely prevalent, the charges for the maintenance and entertainment of the police being defrayed out of taxes levied on the inhabitants of the district in which they were quartered. It thus became the interest of the inhabitants, as a whole, to reduce the amount of crime, and so get rid of the burdensome police. (C. M. A.)

## CHAPTER LIV.

### PROBLEM IX.

#### *To improve the Expedients for the Identification and Discovery of Individuals.*

THE bulk of offences would never be committed at all but for the hope which the culprits harbour that they may remain undiscovered. Everything which tends to improve the expedients for the Identification and Discovery of men engaged in crime adds to the general security.

*Expedients  
to facilitate  
the Dis-  
covery and  
Identifica-  
tion of In-  
dividuals.*

This suggests one reason why we have so little to fear from those who dwell in a fixed abode, and have property or a family. The danger springs from men who, by reason of their poverty or their independence of all ties, can readily conceal their movements from the gaze of Justice.

Registers of the people, which contain a description of each person, showing his abode, age, sex, calling, and whether he be married or single, are materials primarily needed for effective police administration. It is proper to confer on the magistrate power to require from every suspected person an account of his mode of gaining a livelihood, and, pending inquiries, to commit to a place of detention such as cannot show that they are engaged in some employment, or are possessed of some means of subsistence.

*Registers of  
the people.*

In connection, however, with this branch of our subject, two general observations must be made. First, that the police code ought not to be harassing, nor extend to trifling points of detail, and so place the public in the position of either becoming defaulters or being worried into compliance with a number of tiresome regulations. Precautions found

*Regula-  
tions must  
not be irk-  
some or  
vexatious.*

nor such as  
to shock  
the national  
sentiment

to be necessary in troublous and dangerous times ought not to be adopted during a period of tranquillity; just as the regimen adopted during sickness ought not to be continued when health is restored. The second observation is that care must be taken not to shock the national sentiment: one nation will not tolerate police regulations entirely acceptable to another. In the capital of Japan, everyone is required to bear his name on his outer garment—a precaution which will seem desirable, idle, or arbitrary, according to the trend of popular prejudices.

Characteristic  
Dresses.

Characteristic clothing has a bearing on this problem. A fashion in dress that marks the distinction of sex is a police expedient as mild as it is salutary. The garb that marks the soldier, the seafaring man, or the priest, serves several purposes, but the principal one is that of subordination. In the English Universities the undergraduates wear a special costume, which does not hamper them in any way unless they seek to transgress the bounds limited by the authorities. In charity schools the pupils are made to wear a uniform dress, and in some institutions also a numbered badge.

Distinctive  
Names.

It is much to be regretted that the proper names of individuals should stand upon such an unsatisfactory footing. Distinctions invented when society was in an embryonic stage, to serve the wants of some hamlet, fulfil their purpose very inadequately in a great nation. Now, this confusion in names is attended by a number of inconveniences. The greatest of these is that proof of identity depending on a name has become vague and unsatisfactory, and groundless suspicion may readily be cast on many persons; while the danger to which innocence is thus exposed may well serve as an aider and abettor of crime.

It would be quite feasible to establish a new nomenclature of such a character that every individual in the whole nation should have a proper name, borne only by himself. In a state already organized it may be that the

difficulties arising from such a change would outweigh the advantages, but in a newly-formed colony it would be desirable to avert any confusion of this kind.<sup>1</sup>

It is a custom, common enough among English sailors, to imprint on the wrist the family and baptismal names in well-defined and indelible characters. This is done to insure recognition in the event of shipwreck. Tattoo  
Marks.

Now, if it were possible for such a practice to be generally adopted, morality would secure a new ally, and the laws would acquire new strength; for it would afford an almost unfailing safeguard against a host of offences, especially against any kind of fraud which is dependent for success on gaining the victim's trust and confidence. Who are you? With whom am I dealing? There would be no room for evasion in answering this important question.<sup>2</sup>

The very circumstance that this expedient is so drastic in its character would really tend to favour personal liberty, by rendering it possible to relax the rigour of criminal proceedings. Such imprisonment as was directed merely to securing the presence of the prisoner during the pendency of process would become rare, when the man was known to be detained, so to speak, by an invisible chain.

I am conscious of plausible objections to this scheme. During the period of the French Revolution, how many persons owed their safety to a disguise, which an imprint of this nature would have made impossible! Moreover, the state of public opinion nowadays presents an insurmountable obstacle to the adoption of this practice; but

<sup>1</sup> Here is a sketch of a general plan. The complete denomination of the individual might comprise the following parts: (1) A single family name, essential to identify the stock; (2) a single baptismal, or first, name; (3) the place and the date of birth. This compound denomination would be set out in full in all legal business. The mode of abbreviation for everyday use would depend upon the genius of the particular language (Dumont).

<sup>2</sup> Facilities of identification have been vastly increased by the adoption of the Bertillon system of recording the finger-prints of persons charged with crime. The courts now allow identification by a person expert in the matter of such prints (*R. v. Castleton*, 3 *Crim. App. Rep.*, 74). (C. M. A.)

opinion might undergo a change if we devoted to advocacy of such a scheme a good deal of patience and tact, and made a beginning by notable examples. Suppose, for instance, that we introduced the custom of imprinting the titles of the nobility on their brows, the public would associate with these brands the idea of honour and power. In the South Sea Islands, women submit to a painful operation in order that there may be traced on their skin certain figures with which the idea of beauty is associated. The impression is made by a vast number of punctures which destroy the tissue; and then, by means of friction, coloured powders are forced into the apertures.

## CHAPTER LV.

### PROBLEM X.

*To increase the Difficulties in the Way of an Offender's Escape.*

THE expedients that can usefully be employed for this purpose depend largely on geographical situation—on natural and artificial barriers. In Russia, the sparseness of the population, the severity of the climate, and the difficulty of communication, conspire to invest Justice with a power such as she would hardly be supposed to wield in so vast a territory. Increasing the Difficulties of Escape.

At Petersburg and at Riga, a passport cannot be obtained unless and until one's intention to leave has been announced several times in the Gazette. This precaution, taken against fraudulent debtors, adds greatly to commercial confidence.<sup>1</sup>

Everything which increases the facility for the prompt conveyance of information may be referred to this head.

Descriptions are very imperfect and uncertain expedients; silhouettes, which may so readily be duplicated at a trifling cost, would be of much more use. They might be employed either for prisoners whose escape is appre-

<sup>1</sup> Under the Extradition Acts, 1870 to 1895, procedure is now prescribed for the surrender, in certain cases, of fugitive criminals who have escaped to England. But the accused will not be surrendered if the offence is of a purely political character. Treaties of reciprocity exist between England and some thirty-five foreign States. Where an offender has fled from this country to a British possession, or a place to which the Foreign Jurisdiction Acts apply, his arrest may be secured under warrants issued by virtue of the Fugitive Offenders Act, 1881. Cf. also the Indian Extradition Act, 1903 (Act XV, of 1903). (C. M. A.)

hended; or for soldiers thought likely to desert; or for any suspected person, charged before the Magistrate, whose further appearance it may be desirable to assure, without having recourse to the harsher measure of imprisonment.<sup>1</sup>

<sup>1</sup> In England there are now statutory provisions as to the keeping of a register of criminals, and the photographing, measurement, etc., of persons convicted of or charged with crime (34 and 35 Vict., c. 112; 54 and 55 Vict., c. 69; Prison Rules, 1899). After the passing of the Licensing Act, 1902, photographs of persons declared to be 'habitual drunkards,' and placed on what was called the 'black list,' were in some districts sent round to the publicans, at the instance of the police authority. (C. M. A.)

## CHAPTER LVI.

### PROBLEM XI.

#### *To lessen Uncertainty in the Matter of Procedure and Punishment.*

IT is not my intention to enter, at this stage, upon the vast subject of procedure; that will form the topic, not of a chapter, but of a separate work. I shall confine myself to two or three general observations.

Diminish-  
ing the  
Uncer-  
tainties of  
Procedure  
and Pun-  
ishment

If a crime has, in fact, been committed, it is in the interest of society that the Magistrate, charged to punish it, should be informed of its occurrence, and informed in such fashion as will authorize him to inflict the appropriate punishment. Though it be merely alleged that a crime has been committed, it is in the interest of society that the truth or falsity of the allegation should be demonstrated by judicial proofs. It follows, therefore, that the rules of evidence and the forms of procedure ought to be such as, on the one hand, to secure the admission of all well-founded information; and, on the other, to insure the rejection of all false information—that is to say, everything which would be more likely to mislead than to enlighten.

Nature has furnished us with a model of procedure. Consider what takes place before the domestic tribunal: examine the conduct of the father of a family towards the children and servants of whom he is the head. There we may trace the original features of Justice, which, when distorted by men incapable of discerning the truth or interested in disguising it, can no longer be recognized. A good judge is nothing more than the father of a family operating upon a larger scale; and such expedients as are fitted to aid a

Analogy of  
the Domes-  
tic Forum

father in his search after truth should prove equally suited to the judge. This procedure was vouchsafed to us, in the beginning, as a model, and to its canons we ought always to have adhered.

It is true that we may feel able to repose in a father a degree of confidence such as we cannot accord to the judge; for a judge is not prompted by the same motives of affection, and may, indeed, be led astray by some personal bias. But this merely proves that, in the case of a judge, it is necessary to take precautions against partiality and corruption, such as are not needed in the domestic tribunal. It does not prove that the forms of procedure or the rules of evidence should be different.

Certain  
Maxims of  
English  
Jurispru-  
dence.

English jurisprudence has accepted the following maxims:

- (a) That no man shall be a witness in his own cause.
- (c) That no man shall be compelled to criminate himself.
- (γ) That the testimony of a person interested in the cause is not admissible.
- (δ) That hearsay evidence is never admissible.
- (e) That no man shall be put in peril twice for the same offence.

It is not my intention, in this place, to discuss these rules of evidence to which we may apply the phrase—*Penitus toto divisos orbe Britannos*.<sup>1</sup> When treating of procedure in general, we shall take occasion to inquire whether English jurisprudence, superior in some respects to that of any other nation, owes its superiority to these maxims, or whether they are not, in fact, the chief cause of the lack of executive power, which weakens police administration in England and leads to undoubted frequency of crime.

All that I desire to point out at this stage is that every precaution, which is not absolutely necessary as the shield

<sup>1</sup> 'At nos hinc alii sitientis ibimus Afros,  
Pars Scythiam et rapidum cretas veniemus Oaxen,  
Et penitus toto divisos orbe Britannos.'  
(Virgil, *Bucol.*, Eclog. I. 54-56.)

The maxims (a) and (γ) no longer obtain. (C. M. A.)

of innocence, affords to crime a protection that is full of peril. I cannot conceive any maxim of procedure more dangerous than one that puts Justice in opposition to herself—that sets up a sort of incompatibility between her various duties. When, for example, it is said to be better that a hundred guilty men should escape rather than one innocent man should be condemned, that imports the existence of a dilemma which is purely imaginary. The security of innocence may be fully assured without, in any way, favouring the impunity of crime; indeed, it cannot be assured at all save on these terms, for every culprit who goes scatheless becomes a menace to public safety. So far from being protected by such an escape, innocence is wont to become the victim of some fresh offence; to let a criminal go scot-free is to commit, by his hands, any crime which he may hereafter see fit to perpetrate.

Judex  
damnatur  
cum nocens  
absolvitur.

The difficulty of prosecution is one cause of the impunity of crime and of the impairment of judicial authority. When the law is clear, and the judge is summoned to his duties immediately after an offence is alleged to have been committed, the function of the prosecutor hardly differs from that of an ordinary witness. For when the offence is committed, as it were, under the eye of the judge, we may say that only two characters are essential to the Drama—the judge and the offender. It is distance of time and delays which distinguish the function of the witness from that of the judge. But it may well be that it is impossible to secure the attendance of all the witnesses, or that the offence is not discovered until long after its commission, or that the accused alleges, by way of defence, certain facts that cannot be readily verified; all or any of these circumstances may make delays inevitable. Delays give occasion to incidents which breed fresh delay. Thus judicial process becomes complicated; and, in order to pursue the chain of operations without confusion or neglect, we must entrust to some particular person the conduct of the prosecution.

Difficulty  
of Prosecu-  
tion leads  
to Im-  
punity.

Hence arises another function, that of the accuser. This accuser may be one of the witnesses, or a man interested in the case, or a public official specially appointed for the purpose.

Complications  
caused by  
preliminary  
Examinations.

The judicial functions have often been separated in such fashion that the judge, who takes the evidence, whilst the facts are fresh in the minds of the witnesses, has no right to decide upon the case, but must send it forward to some other judge, who will have no leisure to attend to it until the evidence has lost its freshness. In most States a great number of useless formalities have grown up from time to time, and it has become necessary to create officials to secure compliance with these formalities. The system of procedure is so complicated as to become in itself an abstruse science; and, if a man wishes to prosecute an offence, he is compelled to put himself into the hands of an attorney, while the attorney himself cannot get along without the aid of another man of law of a superior grade, who advises him what to do and does the talking for him.

To these disadvantages we must add two others:

Injustice of  
Law Taxes.

1. By subjecting legal proceedings to most ill-advised taxation, legislators, without realizing that they thus put themselves in conflict with themselves, have often refused access to the tribunals to those who stand in greatest need of assistance from such tribunals.<sup>1</sup>

Odium attaching to  
Informers.

2. To those who, in the capacity of prosecutors, lend their aid to the execution of the laws, there attaches a considerable amount of popular odium. This is a foolish and pernicious prejudice, which legislators have often been weak enough to encourage, without ever making any effort to overcome it.

Necessity  
for appointment  
of a Public  
Prosecutor.

Now, what is the result of this piling up of delays and discouragements? The laws are not, in fact, put into force. Were a man allowed to address the judge at the outset, and tell him what he had seen, the expense he would incur would

<sup>1</sup> The power to direct payment of costs out of public funds was not completely established until the passing of the Costs in Criminal Cases Act, 1908 (8 Edw. VII., c. 15). (C. M. A.)

be very trifling. In proportion to the number of intermediate steps that he is compelled to take, his expenses increase; and when to this we add loss of time, worry, and uncertainty of success, it is astounding that men are still found resolute enough to embark upon such an undertaking. They are, indeed, few in number, and would be fewer still if those who enter into the lottery knew as well as the lawyers what the cost is likely to be and what the chances are against them.

Appoint-  
ment of a  
Public  
Prosecutor  
— *contd.*

Those difficulties would disappear altogether on the appointment of a public prosecutor, clothed with some of the characteristics of a magistrate, who would conduct the case at the public charges. Informers who looked for payment need have but small rewards; while a hundred voluntary informers would come forward for one who would ask for payment.<sup>1</sup> Every law, thus put into force, would display its real effect, baneful or beneficial as the case might be: the good grain might be garnered, and the tares cast into the fire. Informers, impelled by public spirit, and refusing any kind of pecuniary reward, would be heard with all due respect and confidence; while the culprit would no longer be able to escape punishment by entering into a bargain with the prosecutor, either to withdraw from the case or to take up an attitude favourable to the accused.<sup>2</sup>

It is true that in England the prosecutor of any grave accusation is forbidden to make a compromise with the accused, save by the permission of the judge; but even if this prohibition were general, what effect would it be likely to have in cases where both parties were interested in evading it?

<sup>1</sup> 'I know by experience,' said Sir John Fielding, 'that for one information laid before me from an expectation of reward, I have received ten prompted solely by a desire for the public good.'

The cost of a prosecution in an ordinary court of justice is at least £28 sterling, a sum almost as great as that required by the family of a poor man for a twelvemonth. How can one expect a man, from public spirit, to make such a sacrifice, quite apart from all the attendant worry and trouble? With such a system of procedure, it would indeed be a miracle if the laws proved as efficacious as they would be were these obstacles removed (Dumont).

<sup>2</sup> Where an information for an indictable offence is *withdrawn* the circumstances must now be communicated to the Director of Public Prosecutions (42 and 43 Vict., c. 22, s. 5). (C. M. A.)

## CHAPTER LVII.

### PROBLEM XII.

*To prohibit Accessory Offences with a View to preventing the Commission of the Principal Offences.*

Meaning of  
Accessory  
Offence.

Acts which are connected, by way of cause, with a pernicious event may be regarded, in relation to the *principal* offence, as being *accessory* offences. The principal offence being well and clearly ascertained, we may distinguish as many accessory offences as there are acts which serve as preparatory to the intended crime or manifest an intention to commit it. Now, the more careful we are in distinguishing these preparatory acts with a view to their prohibition, the greater will be the chance of preventing the commission of the principal offence. If the criminal be not stopped at the very first step, he may be, perhaps, at the second or the third. It is in this way that a wary lawgiver, like some skilful general, reconnoitres the enemy's outposts for the purpose of foiling his plans. Along all the byways and narrow defiles that lie in the line of march, he stretches a chain of works, diversified according to circumstances, but so connected together that the enemy is faced, at every step, with fresh perils and fresh obstacles.<sup>1</sup>

Importance  
of prohibiting  
Accessory Offences.

If we consider the practice of legislators, we shall find that, while none of them has worked systematically on this plan, every one of them has adopted it to a certain extent.<sup>1</sup>

<sup>1</sup> In the Code Teresa, under each head of offences, there is a sub-head of *indicia*. These *indicia* are distinguished thus: *indicia ad capturam*, *indicia ad torturam*—those which are enough to justify arrest, those which are enough to justify the application of torture. The practice of torture has not, even now, been abolished (Dumont).

Offences in relation to sporting rights have, for example, been separated into a number of accessory offences, varying with the nature of the game pursued, and regulating the kind of nets or other instruments to be employed in the pursuit, etc. In a similar fashion smuggling has been attacked, by prohibiting a number of preparatory acts; while frauds connected with the coinage have been met in the same way.<sup>1</sup>

I will now give some further illustrations of what might be done in this branch of the criminal law by the creation of 'accessory' offences, with a view to the prevention of unlawful homicide and bodily injuries.

Offences  
accessory  
to Homicide and  
Bodily  
Injury.

I may begin by suggesting the prohibition of such weapons as are easy to conceal, and are useful only for offensive purposes. It is said that in Holland an instrument is made shaped like a needle, which, when shot through a tube, inflicts a deadly wound. The manufacture, sale, or possession, of such instruments ought to be forbidden as an offence accessory to murder.

Ought pocket-pistols, such as are used in England by highwaymen, to be prohibited?<sup>2</sup> The utility of the prohibition is doubtful. Of all methods of robbery, that which involves the employment of firearms is the least dangerous to the person attacked. In such cases the threat alone is usually enough to compass the intended purpose. The robber who fired at the outset would not only perpetrate an act of useless cruelty, he would disarm himself; while by reserving his shot he would remain in a position to defend himself. He who uses a club or a sword has not the same reason to abstain from striking; indeed, the first blow supplies a sort of motive for a second, so that the robber may reduce his victim to such a condition that pursuit would become impossible.

Prohibition  
of use of  
Pistols.

<sup>1</sup> Cf. reference to drugs, etc., *ante*, vol. i., p. 228. (C. M. A.)

<sup>2</sup> Cf. the Pistols Act of 1903 (3 Edw. VII., c. 18), which creates offences in relation to the sale or hire of pistols. (C. M. A.)

Prohibition  
of Sale of  
Poisons.

Prohibition of the sale of poisons involves the preparation of a list of poisonous substances. And, in point of fact, we cannot preclude the sale altogether, as every active medicine, taken in a certain dose, would constitute a poison; all that we can do is to regulate the sale, to subject it to precautions, to require that the seller should have some acquaintance with the buyer, should effect the sale in the presence of witnesses, and register it in a special book; and even then some latitude must be allowed for exceptional cases.<sup>1</sup> These regulations, to be complete, would entail a vast amount of detail. Would the advantages outweigh the difficulties and trouble involved in their observance? That will depend on the manners and customs of the community. If poisoning be a crime of frequent occurrence, it will be absolutely necessary to adopt these indirect expedients: they would have proved very serviceable under the conditions that prevailed in ancient Rome.

Division of  
Accessory  
Offences.  
Attempts.

Accessory offences may be divided into four groups:

Accessory offences of the first class indicate a formed intention to commit the principal offence, and are comprehended under the general name of 'attempts.'<sup>2</sup>

Situations  
calculated  
to induce  
crime.

The second class do not involve the supposition that an intention to commit crime has been actually formed, but rather that some determinate individual is so placed as to give ground for fearing lest he should presently conceive a criminal design. Gaming, extravagance, or idleness when conjoined with poverty, afford illustrations of this class. So, again, cruelty to animals is a stage on the road towards cruelty to mankind.<sup>3</sup>

<sup>1</sup> See, e.g., the Pharmacy Act, 1868 (31 and 32 Vict., c. 121, ss. 15, 17), and the Poisons and Pharmacy Act, 1908 (8 Edw. VII., c. 55). (C. M. A.)

<sup>2</sup> A soldier, at a review, charges his musket with a ball; but his misconduct is found out before the order to fire is given. This may be regarded as a *preparatory* act. If he had fired at some person, or body of persons, without effect, that would have amounted to an 'attempt.' If he had killed anyone, he would have committed the complete crime known as 'homicide' (Dumont).

<sup>3</sup> Hogarth, in tracing cruelty through its different stages, represents it as beginning with delight in the suffering of animals, and ending in the most savage murder. (C. M. A.)

The third class do not involve any criminal intention which is actual or probable, but only one that is possible on the happening of some accident or contingency. Offences of this kind are created when police regulations are framed with the view of averting calamities; when, for example, we forbid the sale of certain poisons or of gunpowder. A breach of these regulations, quite apart from any question of criminal intention, is an offence comprised in the third group.

Breaches of certain precautionary measures.

The fourth class may be described as 'presumed' offences—that is to say, acts which are deemed to be proofs of the commission of an offence. Such acts may be in themselves harmful or harmless; but they furnish presumptive evidence of the commission of certain offences, which have been styled 'evidentiary' offences. By an English statute,<sup>1</sup> certain conduct on the part of a woman is punished as murder, because it is assumed that such conduct is a sure proof of infanticide. By another statute, it is made a capital crime for men bearing arms to band together and go about in disguise: it was supposed that such a proceeding was proof of a plot to commit murder, in order to protect smugglers from arrest. By a third statute, it is an offence to be found in possession of stolen goods without being able to give a satisfactory account as to how they were obtained, because this circumstance has been deemed to be proof of complicity in the theft.<sup>2</sup> By yet another statute, it is a crime to obliterate marks on shipwrecked property, such action being considered to afford evidence of an intention to steal.

Acts affording presumptive evidence of an offence deemed to amount to an offence.

Now, these offences, founded on presumption, imply not only distrust of the system of procedure, but also distrust

<sup>1</sup> By the statute 21 Jac. I., c. 27 (repealed in 1802), the mother of a bastard child, concealing its death, was required to prove by one witness that the child was born dead; otherwise such concealment was treated as evidence of her having murdered it—a law which even Blackstone regarded as savouring 'pretty strongly of severity' (book iv., chap. xiv.). (C. M. A.)

<sup>2</sup> *Cf.*, e.g., 22 Geo. III., c. 58, s. 2, repealed in 1861. (C. M. A.)

in the wisdom of the judge. The English legislator, believing that juries, too prone to lenity, would not treat such presumptive evidence as sufficient proof of crime, has made the mere act which gives rise to the presumption a separate and distinct offence in itself. In countries where the legal tribunals enjoy the full confidence of the legislature, such acts may be placed in their proper category and ranked simply as presumptions, leaving it for the judge to draw the proper inferences therefrom.

In connection with accessory offences, it is essential to lay down three rules, by way of *memento* to the legislator:

Rules to be  
observed in  
connection  
with ac-  
cessory  
offences

(a) Whenever a principal offence is created, the prohibition must extend, under some penalty, to preparatory acts and simple attempts; but this penalty should usually be less than the penalty imposed for the principal offence. This rule is general, and any exceptions ought to be based on special considerations.

(β) Under the description of the principal offence, there ought therefore to be ranged all such accessory offences, preliminary or concomitant, as are susceptible of specific and precise delimitation.

(γ) In the definition of accessory offences, we must take care not to impose too much restraint, not to trench too much upon individual liberty, not to expose innocence to peril from hasty conclusions. Indeed, the definition of an offence of this kind will almost always be dangerous if it does not contain a clause reserving to the judge the right to estimate the degree of the presumption to be drawn from the doing of the acts involved in the commission of such offence. If that course be taken, to create an accessory offence is much the same thing as to call the attention of the judge to the matter, by way of instruction and in the character of an indicative circumstance—leaving him free to refuse to draw any presumption from it, if he sees special ground for, regarding the indication, as inconclusive.

If the punishment for a preparatory offence, or for all offences only partially committed, were the same as that for the principal or complete offence, without any allowance being made for the possibility of the culprit repenting, or desisting from prudential reasons, the man, finding himself faced with the same punishment for the mere attempt, would not hesitate to consummate the crime, as he would not thereby incur any additional peril.<sup>1</sup>

The punishment of accessory offences.

<sup>1</sup> Bentham's views on these points have been, in a large measure, adopted. On an indictment for felony or misdemeanour, the party charged may be found guilty of an 'attempt' to commit the same, if it appear that he did not complete the offence (14 and 15 Vict., c. 100, s. 9). But, in the absence of express statutory provision, a mere attempt to commit an offence punishable only on summary conviction is not in itself an offence. (C. M. A.)

## CHAPTER LVIII.

### OF THE CULTURE OF BENEVOLENCE.

The Principle of Benevolence associated with Love of Reputation.

THE principle of benevolence is quite distinct from the love of reputation. Either may come into play without the other. The sentiment of benevolence may be an instinctive feeling, a gift of nature; but it is in great measure a product of culture, the offspring of education. For where shall we find the greater amount of benevolence—among the English or among the Iroquois; when society is in its infancy or when it has reached a mature stage? Yet if the sentiment of benevolence be susceptible of increase—and of this there can be no doubt—it must be by the aid of that other impelling motive of the human heart, known as the love of reputation. When the moralist represents benevolence in the most amiable light, while portraying egoism and hardness of heart in the most odious colours, what is he seeking to do? Why, to conjoin with the purely social principle of benevolence the partly selfish and partly social principle of reputation. He seeks to unite them, to give them the same objective, to strengthen each of them by association with the other. If his efforts are crowned with success, to which of these two principles ought he to award the palm of victory? Neither to the one nor to the other exclusively, but to both of them allied in mutual co-operation; to the love of benevolence as the more immediate cause, to the love of reputation as the more remote cause. The man who yields with delight to the soothing accents of the social principle neither knows nor wishes to know that the source of these dulcet tones

may be traced to a much less noble principle. Such is the disdainful delicacy of the better elements in our nature; they would fain ascribe our emotions to themselves alone, they blush at every alien association.

The legislator should have two objects in view: (1) To lend fresh vigour to the sentiment of benevolence; and (2) to regulate its application according to the Principle of Utility.

Objects to be aimed at by Legislator.

1. If he would inspire humanity in the citizen, the legislator must, in the first instance, set him an example. He must display the most profound regard, not only for the lives of men, but for every circumstance which influences their sensibility. Sanguinary laws tend to make men cruel, either through fear, or through imitation, or by fostering a spirit of revenge; but laws dictated by a spirit of mildness humanize a nation's manners, and the chastened spirit of their rulers is, thus, reproduced in the homes of the people.

FIRST OBJECT: To strengthen the Sentiment of Benevolence.

The legislator should forbid everything that may serve as an incitement to cruelty. The barbarous gladiatorial shows, introduced at Rome in the later days of the republic, doubtless contributed to inspire the Romans with the ferocity they were ever wont to display in the conduct of their civil wars. A people accustomed at their games, and in pursuit of pleasure, to set human life at naught will hardly respect it when blinded by the fury of their passions.

Prohibition of Incitements to Cruelty.

For the like reason it is proper to forbid every kind of cruelty practised towards animals, whether by way of amusement or for the gratification of gluttony. Cock-fights, bull-baiting, coursing, fox-hunting, fishing, and other amusements of the same kind, necessarily imply either a certain want of reflection or a lack of humanity, since they entail on sensitive beings the most lively suffering, ending too often in the most painful and lingering death of which we can form any conception. It may be allowed to man to slaughter animals, but not to torture them.

Cruelty to Animals.

Death by artificial means may readily be rendered less painful than natural death, and that, too, by simple processes well worth the trouble of being studied and imported into our schemes of police administration. But why should the law refuse its protection to any single sensitive being? A time will surely come when the mantle of humanity will be stretched over every creature that draws breath. We have begun by extending pity to the sad lot of the slave; we shall end by alleviating the fate of the animals that aid us in our daily tasks and minister to our necessities.

**Ceremonial  
Politeness  
in China.**

I do not know whether, in establishing their minute and detailed ceremonials, the lawgivers of China have aimed at the culture of benevolence, or merely at the maintenance of peace and subordination. Politeness has become in China a sort of cult or ritual, which is the chief object of education and quite an important science. The outward movements of this great people, being at all times governed by rule and in accord with a prescribed ceremonial, are well-nigh as uniform as those of a regiment of soldiers practising their drill.

This pantomime of benevolence may, however, be void of all reality, just as a religious service, overlaid with trifling ritual, may be destitute of all moral significance. So much constraint seems ill-attuned with the natural impulses of the human heart; and these demonstrations of feigned respect will rarely create any sense of obligation, because they are known to be of no real worth.

**Principles  
of Antipathy  
that  
tend to  
destroy  
Benevo-  
lence.**

Certain principles of antipathy are at times so interwoven into the political constitution of a state that it becomes extremely difficult to get rid of them. There are, for example, hostile religions which kindle among their adherents mutual hatred and the lust of persecution; hereditary feuds between powerful houses; privileged conditions that erect insurmountable barriers parting the ranks of the citizens; certain effects of conquest, where

the conquering nation has never succeeded in mingling and incorporating itself with the conquered; fierce animosities founded on ancient wrongs; government factions which take their rise in victory and fall again upon defeat. In an unhappy state of affairs such as we here indicate, men's hearts are far oftener brought into touch by sharing a common hate than by mutual love. A nation must be freed from fear and oppression before it can be taught benevolence. The destruction of prejudices, that drive the people into hostile camps, manifestly augments goodwill, and so renders a conspicuous service in the cause of morals.

In the record of his travels in Africa, Mungo Park has portrayed the negro from an interesting point of view. His simplicity, the strength of his domestic affections, his guileless nature, all serve to enlist public interest in his favour.

The satirists weaken and impair any such sentiments as these. After reading Voltaire, does one feel favourably disposed towards the Jews?<sup>1</sup> If the author had displayed more benevolence in this regard, he would, when depicting the degradation of their condition, have afforded at the same time an explanation of the less agreeable traits in the Jewish character, and in doing so would have indicated the remedy while he described the disease.

The most deadly attack on benevolence has been levelled at it by exclusive religions, which sanction the performance of incommunicable rites, breathe a spirit of intolerance, and represent unbelievers as infidels, as the enemies of God.

The art of stimulating benevolence by giving publicity to any exhibition of it is better understood in England than in any other country. Suppose it is sought to create some endowment, some charity, which requires co-operation on a large scale. A committee is formed, consisting of the most active and distinguished supporters of the movement; the extent of the contributions is announced in the press; the names of the subscribers appear in print

Exclusive Religions that impair Benevolence.

Stimulating Benevolence by public Exhibitions of it. Benevolent Associations.

<sup>1</sup> See, e.g., *Un Chrétien contre Six Juifs*, published in 1776. (C. M. A.)

Benevolent  
Associations—  
contd.

from day to day. This publicity fulfils more purposes than one: its immediate object is to afford a guarantee as to the receipt and employment of the funds, but it also serves as a bait to vanity by which benevolence profits.

In certain charitable institutions the annual subscribers are named 'governors.' The control they are called upon to exert in the little community that is thus formed lends an interest to their gratuitous duties. They love to follow up the good work they are doing, and vastly enjoy the authority conferred upon them. Being brought, as benefactors, into close contact with the persons relieved by their charity, and having the sufferers, so to speak, under their eyes, their benevolence is strengthened and sustained; for as the objects of bounty recede in the distance, benevolence grows cooler, but it warms again as those objects once more draw near.

There are more of such benevolent associations in London than there ever were convents in Paris. Many of the charities are directed to special objects—the blind, the lame, orphans, widows, the sons of the clergy, etc. Each of us is more touched by one form of misery than another, and our sympathy is generally affected by some personal circumstance. It follows, therefore, that there is much art in diversifying charities, in separating them into different branches, so that every kind and form of sensibility may be brought into play, and none may be lost. It is surprising that more advantage has not been taken of the benevolent disposition of women, with whom the sentiment of pity is more pronounced than with men. There were formerly two institutions in France well adapted to appeal to womankind: the Daughters of Charity, who devoted themselves to the service of the hospitals; and the Maternal Society of Paris, formed by ladies who visited poor women in pregnancy and gave assistance during the early infancy of the children.<sup>1</sup>

<sup>1</sup> This association has just been re-established (Dumont, in 1802).

2. The sentiment of benevolence is apt to lead one astray from the general Principle of Utility. It can only be controlled by means of instruction; and we must not use force or authority. We must persuade and enlighten; we must teach men, little by little, to distinguish the varying degrees of utility, and to proportion their benevolence to the extent of its object. The finest model is to be found in the words of Fénelon, wherein he depicts the feelings of his own heart: 'I prefer my family to myself, my country to my family, and the human race to my country.'

SECOND OBJECT: To regulate the Sentiment of Benevolence in accordance with the Principle of Utility.

We should therefore endeavour, by public instruction, to direct the affections of the citizen towards the aims of general utility; to repress the vagaries of benevolence; to make a man feel that his own interest lies in the common weal. We should teach him to be ashamed of thinking only of his own family, his own order, his own sect, his own party—that spirit which is so much at variance with a true love of country. We should teach him, too, to be ashamed of the false and bastard love of country that turns to hatred of other nations. We should dissuade him from allying himself, through misplaced pity, with the cause of deserters, smugglers, and other persons who offend against the state; and we should disabuse his mind of the mistaken notion that there is any humanity in aiding the escape of a culprit, in securing impunity for crime, or in encouraging mendicancy to the prejudice of industry. We should, in a word, endeavour to give to every sentiment of benevolence the bent which would prove most beneficial to mankind taken as a whole; and this may be done by showing the folly and peril of caprices, antipathies, and momentary impulses, such as turn the balance against general utility and enduring interests.

Misplaced Charity.

Bastard Patriotism

The more enlightened men become, the more surely will they attain a spirit of general benevolence; for they will see that the points at which the interests of individual members of society are found to be identical far exceed in number the

Enlightenment leads to Benevolence.

points at which they will prove to be at variance. In the world of commerce, nations, in their folly, have treated each other as rivals who could never rise save upon each other's ruins. The work of Adam Smith is a treatise on universal benevolence, for it shows that commerce is equally advantageous to all the countries that engage in it; that each benefits in its own way according to its own natural resources; that nations are partners, not rivals, in the great social enterprise.<sup>1</sup>

<sup>1</sup> The *Wealth of Nations* was first published in March, 1776. (C. M. A.)

## CHAPTER LIX.

### USE OF THE MOTIVE OF HONOUR: THE POPULAR SANCTION.

HERE again the legislator should have in view an augmentation of the strength of this motive, and the regulation of the motive when applied. The Motive  
of Honour.

The strength of public opinion is in a ratio compounded of its extent and its intensity. Its extent is measured by the number of suffrages; its intensity by the degree of blame or approbation.

So far as concerns its extent, there are several expedients that may be employed to increase the strength of public opinion: the most important are—liberty of the press, and publicity of all proceedings in which the nation has an interest, such as proceedings in the courts, or the management of the finances of the state; and parliamentary discussions, unless secrecy chances to be requisite for some specific reason. An enlightened public—the depository of the archives and the laws of honour, as well as the administrator of the moral sanction—constitutes a supreme tribunal to adjudicate upon all causes, and in respect of all sorts and conditions of men. By means of publicity given to proceedings in which the nation is interested, this tribunal will be in a position to collect and sift the evidence and to form a considered judgment; while liberty of the press will enable that judgment to be pronounced and carried into execution. Increasing  
Public  
Opinion in  
point of  
Extent.

As to increasing the intensity of the strength of public opinion, there are also a number of expedients that may Increasing  
Public  
Opinion  
in point of  
Intensity.

be employed. Such as, for example, punishments which are invested with something in the nature of ignominy; or rewards of which the main object is to confer additional honours on those who are adjudged fit to receive them.

Expedient  
for con-  
trolling  
Public  
Opinion.

There is, too, a way of guiding or controlling public opinion in secret, so to speak—that is to say, without anyone suspecting that it is being done. It is effected in this wise: matters are so arranged that the occurrence we wish to prevent cannot come to pass without the happening of some previous event, which the popular voice has already condemned as undesirable. If, for example, we are concerned to prevent the evasion of some tax, we may require from the tax-payer a declaration on oath or a certificate of due payment, as circumstances may suggest. Now, the taking of a false oath or the fabrication of a false certificate is an offence which the public is ready beforehand to brand as infamous, whatever may be the occasion or pretext for its commission. Here, then, we have a sure means of attaching disgrace to an action which, without the accessory, might not meet with disapproval.

Sometimes a mere change of *name* is enough to change the sentiments of a nation. The Romans abhorred the name of *King*, but they would tolerate the style of *Dictator* or *Emperor*;¹ Cromwell could not have succeeded in seating himself on the throne of England, yet under the title of *Protector* he enjoyed more than kingly authority; Peter the Great relinquished the use of the description

¹ Cf. the remarks of Professor J. S. Reid in the *Companion to Latin Studies* (p. 244): 'The story accepted by the later Romans, that the Republic was created by an aristocratic upheaval against Etruscan despots, has borrowed many of its details from the history of Greek States. But in its essence it is credible enough. It accounts for the odium which attached, in all subsequent time, to the words *Rex* and *Regnum*. The cry that a popular leader was attempting to make himself a *Rex* was fatal in many cases, from Mælius to the Gracchi and Cæsar.' See, too, Shakespeare's *Julius Cæsar*, Act I., Scene 2, where Cassius says:

'There was a Brutus once that would have brooked  
Th' eternal devil to keep his state in Rome,  
As easily as a king.' (C. M. A.)

‘despot,’ and directed that the slaves of the nobles should thenceforth be called ‘subjects.’

If the people were really philosophic, such an expedient would be of no avail; but on this point so-called ‘philosophers’ are no wiser than ordinary mortals. What deception lurks in the words *liberty* and *equality* ! What inconsistencies in regard to the *luxury* that everyone condemns, and the *public prosperity* which the whole world applauds !

The legislator must beware lest he forge weapons that may be used to support public opinion when it is found in conflict with the Principle of Utility. For this reason, he ought to rid the laws of every trace of the pretended crimes known as heresy and witchcraft, so that he may not afford any legal support to these superstitious figments. If he be not bold enough to assail an error but too widely diffused, he should, at least, take care not to lend it any fresh sanction.

It is very difficult to employ the motive of honour so as to enlist citizens in the service of laws directed against criminals. Pecuniary rewards granted to informers have failed of their purpose. The motive of gain has been overpowered by a feeling of shame; and, indeed, in thus offering a bait reprobated by public opinion, the law, so far from augmenting its strength, has actually impaired it. Men have recoiled from the suspicion of acting from a mean motive. An ill-chosen reward repels where it is intended to attract; and the gratuitous protectors of whom the law is thus deprived outnumber the mercenary ministers whose services are bought with gold.

The most powerful expedient for working any great change in public opinion is to strike the minds and imagination of the people by means of some conspicuous example. Thus, Peter the Great, by actual personal service in every rank of the army, taught his nobles, by force of his example, to bear the yoke of military subordination. So, too, Catherine II. surmounted the popular prejudice against inoculation—not by experiments on criminals after the manner of Queen Anne, but by submitting to it herself.

Rewards  
to In-  
formers.

The force of  
Example.

## CHAPTER LX.

### USE OF THE MOTIVE OF RELIGION.

The Culture  
of Religion.  
Its Objects.

IN the culture of religion, two objects should be kept in view: (1) To increase the force of the religious sanction; (2) to see that the force is applied in a proper direction. It is obvious that, if ill-directed, the less the force of the sanction, the less the harm that will be done. In this matter of religion, then, the first thing to ascertain is *the direction* in which the force tends; the quest of expedients, calculated to increase the force, becomes only a secondary object.

The direction ought, of course, to conform with the dictates of Utility. As a sanction, it is composed of punishments and rewards. These punishments should attach to such acts as are harmful to society, and to such acts only; while the rewards should be proffered for such acts as tend to the benefit of society, and for none other. This we lay down as our cardinal canon.

The only method of determining the direction of the force is to consider it in relation to the welfare of political society. Any other consideration is a matter of indifference; and whatsoever is indifferent in religious belief is apt to become pernicious.

Coercive  
Measures to  
promote  
Religious  
Belief.

Now, every article of faith of necessity becomes harmful so soon as the legislator, to favour its adoption, has recourse to coercive motives—that is to say, motives resting on the dread of punishment. The persons whom he seeks to influence may be regarded as forming three groups: those who are already of the same opinion as the legislator;

those who reject that opinion; those who neither accept nor reject it.

For the conformists no coercive legislation is needed; for the nonconformists it is useless, since by our supposition it will not fulfil its purpose.

When a man has formed an opinion, can punishment make him change it? The very question seems an insult to good sense. Punishment would rather tend in the opposite direction, and would do more to confirm him in his opinion than to induce him to alter it. This is due partly to the fact that the use of coercion is in itself a tacit avowal that no sound arguments are forthcoming, and partly to the fact that recourse to violent measures begets an aversion from opinions that are sought to be upheld by such odious expedients. Punishment will never make a man believe; all that it can do is to make him declare that he believes.

Those who, through strength of conviction or for honour's <sup>'Persecution.'</sup> sake, refuse to make any such declaration must undergo the evil of punishment—that is, persecution. For what is called *persecution* is, indeed, an evil without any compensating advantage, an evil inflicted to no good purpose whatsoever: and such an evil, suffered at the hands of the magistrate, is in kind precisely the same as if it were wrought by an ordinary malefactor; while in degree it is much more serious.

Men of less resolute and noble mind, who escape by means of a false declaration, yield to menace and to the peril which is pressing them so closely. But the punishment, thus avoided for the moment, assumes for them new forms—pangs of conscience if their faith be of a scrupulous cast, coupled with the punishment that springs from the contempt of mankind, who look with scorn on such hypocritical recantations. In this state of things, what happens? To be at peace among themselves, one half of the citizens must grow accustomed to hold, in contemp-

Religious  
Tests.  
False De-  
clarations  
of Assent.

tuous disregard, the opinion formed of them by the other half. They are at pains to discover subtle distinctions between innocent falsehood and criminal falsehood: they set up a type of privileged lies to serve as a protection against tyranny: that is to say, they establish customary perjuries and false subscriptions which are to be deemed mere matters of form. In the midst of these subtleties truth speaks with faltering voice; the bounds that delimit good and evil become confused; a train of additional falsehoods, even less pardonable, follow under cover of those that have preceded them. The tribunal of public opinion is divided; the judges who compose it no longer adhere to the same code of laws; they cease to have any clear perception what degree of dissimulation they should condemn, or for what particular falsities they ought to find excuse; their voices are scattered and at variance; while the moral sanction, having no longer a uniform regulator, becomes degraded and its influence is impaired. In this way the legislator, who insists on religious tests, becomes a corrupter of the people; he sacrifices virtue to religion, though religion itself is good only so long as it serves as an auxiliary to virtue.

Influence of  
penal Laws  
where  
Opinion is  
as yet un-  
formed.

The third group to be considered consists of the persons who, at the date of the penal enactment, have not as yet any formed opinion, one way or the other. With respect to such persons, it is probable that the law will exert some influence upon the formation of opinion. Beholding perils in one direction and safety in the other, it is but natural that they should approach the consideration of arguments, in support of an opinion condemned by the laws, with a measure of fear and aversion, which they would not experience in examining the favoured opinion. Arguments which we hope will prove sound are apt to make a more lively impression on the mind than those we are anxious to discover to be false; and, in this way, a man comes to believe, or, rather, not to reject—not to ‘dis-

believe—a proposition which he would never have accepted had his inclinations been given free play.

In this, the third case, the evil is less than in either of the two cases already disposed of; yet it does not cease to be an evil. It may happen, though it does not always happen, that the judgment will make a complete surrender to the affections; but even when that occurs—that is to say, when the conviction is as strong as it can be—if fear has any place in the persuading motives, the mind is never perfectly at ease. There is always an anxious feeling that what one believes to-day may, perchance, not be believed to-morrow. Belief in a moral truth, once clearly grasped, can in no wise be shaken; but belief in a dogma is always more or less wavering, and hence comes the display of petulant irritation whenever it is assailed.

Penal Expedients lead to a disregard for Truth and a want of respect for Public Opinion.

Inquiry and discussion are dreaded by men who feel that they are not standing on solid ground; it will not do to allow any disturbance of a building which has not been firmly constructed on a sure foundation. The understanding is impaired. The mind seeks complete repose, but only in a sort of blind credulity: it is in quest of every error that seems to have any affinity with its own: it fears to form any clear views as to the possible and the impossible, wishing, indeed, to break down or confuse the bounds that delimit them. It loves the vapouring of sophistry—everything that trammels human intelligence, everything which suggests that complete reliance is not to be placed on reason. It exhibits a tendency to reject evidence, and soon acquires an unfortunate degree of skill in so doing; while at the same time giving undue weight to half-proofs, paying heed to one side only, and indulging in refinements that violate the dictates of reason. In a word, the mind is enslaved by a system of logic, which requires us to put a bandage over our eyes that we may not be wounded by the light of day.

Hence every penal-expedient used to augment the power

of religion assails, though indirectly, that essential part of morals which consists in regard for truth and respect for public opinion. All enlightened upholders of religions nowadays accept this view; but very few nations have acted upon it. Violent methods, it is true, are no longer in vogue; but persecution still persists in the shape of civil penalties, political incapacities, and statute laws full of menace, or perhaps in the form of a precarious toleration—a situation surely humiliating enough for the large body of men, who, in these circumstances, remain undisturbed by virtue only of tacit indulgence, a sort of continuing act of grace.<sup>1</sup>

Position of  
the Legis-  
lator as to  
the Reli-  
gious  
Sanction.

In Catholic  
countries.

In order to obtain a clear idea of the advantages which a legislator may secure by increasing the force of the religious sanction, we must needs distinguish three sets of cases: (a) Those in which the sanction is completely under his own control; ( $\beta$ ) those in which others share the control with him; ( $\gamma$ ) those in which the control rests with some foreign personage. In the last set of cases the sovereign power of the state will, in reality, be shared by two magistracies—the spiritual (as it is commonly styled) and the temporal. For the temporal magistrate will be ever in peril of finding his authority usurped, or at least impugned, by his spiritual rival; so that anything he may do, in the way of augmenting the religious sanction, may perchance result in a diminution of his own power. The pages of history declare to us the disastrous effects of such a struggle. The temporal magistrate enjoins such and such an action; the spiritual magistrate forbids it. If the deed be done, the people are punished by the one, while if it be left undone they are punished by the other. They must be either proscribed or damned; their choice lies between the civil sword and hell-fire.

In Protes-  
tant  
countries.

In Protestant countries the clergy are essentially subordinate to the state authority. Their dogmas, it is true,

<sup>1</sup> In England, the Catholics were not emancipated until 1829, and Jews were excluded from Parliament until 1858. (C. M. A.)

are not dependent upon the sovereign, but the men who interpret those dogmas are. And the right to interpret dogma is pretty much the same thing as the right to manufacture it. Hence, in these countries, religion is more readily modelled in the mould of the political authority. The married priest is more akin to the ordinary citizen—such clerics as he do not present a phalanx that need cause alarm; they can neither confess nor absolve.

But if we look at facts alone, whether the country be Catholic or Protestant, it must be allowed that religion has often played a prominent part in the bringing of misfortunes upon the people. It seems, indeed, to have been more frequently the foe of civil government than its instrument. The moral sanction is never more powerful than when in accord with utility; but the religious sanction has, unhappily, never proved more powerful than when in direct conflict with utility. The inefficacy of religion, so far as concerns its application to the advancement of the public weal, is, indeed, the subject of constant declamation on the part of the very persons who have the greatest interest in exaggerating its good effects. While rarely powerful enough to do good, it has always had sufficient power to do evil. It was the moral sanction which animated Codrus, Regulus, Russell, and Algernon Sidney;<sup>1</sup> it was the religious sanction that made Philip II. the scourge of the Netherlands, Mary the bane of England, and Charles IX. the tormentor of France.

The common solution of the difficulty is to assign all the good to religion, and all the evil to superstition. But for

Religion  
has often  
been the  
Enemy of  
Civil  
Govern-  
ment.

Inadequate  
Explanations.

<sup>1</sup> Codrus, the last King of Athens, is said to have sacrificed his life for his country, entering the Dorian camp in disguise and forcing a quarrel with the soldiers. An oracle is supposed to have declared that victory would rest with the Dorians if the life of the Attic King was spared. The story of the heroism of Regulus, in giving advice to the Roman Senate which insured for him a martyr's death at Carthage, is one of the most celebrated in Roman history. The execution of Lord William Russell, after his refusal to admit that resistance to the King is never lawful, took place in 1683. Algernon Sidney is referred to *ante*, vol. i., p. 89. He, also, was executed in 1683. The attainders of Russell and Sidney were reversed in 1689. (C. M. A.)

Religion as  
an Enemy  
of Civil  
Govern-  
ment—  
contd.

this purpose the distinction is purely verbal. The thing itself is not changed merely because a man may in one case choose to claim it as religion and in another to condemn it as superstition. The motive that operates on the mind is in either case the same: it is none other than the fear of some evil or the hope of some good, proceeding from an all-powerful Being of whom various and varying ideas have been conceived. Thus, in speaking of the conduct of the same man on the same occasion, some will assign to religion what others ascribe to superstition.

' Use ' and  
' Abuse.'

A further solution as trivial as the first, and as inadequate as it is trivial, consists in the contention that it is not fair to argue against the *use* of a thing from its *abuse*; for the very best instruments, it is said, are those which do most harm when they are misused. It is easy to display the futility of this contention. When the effects are good, the thing is said to be *used*; when the effects are ill, it is said to be *abused*. To say that you ought not to argue against the use from the abuse amounts to saying that, in forming a just estimate of the tendency of a given cause, one ought to consider only the good effects, paying no heed to the bad ones. It is true enough that instruments of good, when ill-employed, may well become instruments of evil; but what most betokens perfection in any instrument is the fact that it is not capable of being put to ill-employment. I allow, too, that the most efficacious drugs in the pharmacopœia may be used as poisons; but such dangerous drugs are not, upon the whole, so good as those (if any there be) which answer the same purpose without being liable to cause a mishap. Mercury and opium are most useful; bread and water are still more so.

Improved  
Tendencies  
in Religion  
of late  
years.

I have spoken outright and with perfect freedom. The utility of religion has been expounded by me elsewhere; but I cannot fail here to add that it has, in our day, shown a healthy tendency to disentangle itself from futile and pernicious dogma, and ally itself with sound morals and

sound politics. Irreligion, on the other hand—I am loath to use the word *atheism*<sup>1</sup>—has manifested itself of late years, under the most hideous forms, with immorality, folly, and persecution, in its train. Recent experience ought to be enough to point all sensible men towards the goal at which they should aim; but if governments act hastily, and favour too openly those, even, who are moving in the right direction, they will fail of their purpose. It was freedom of inquiry that corrected the host of errors amassed during centuries of ignorance, and ultimately restored religion to the true path; it is freedom of inquiry that will complete its purification and reconcile it with public utility.

But this is not the place to set forth all the services that religion may render—whether as a solace in the many ills which man is heir to; or by way of moral teaching, such as is best adapted to the most numerous class of the community; or, finally, as an expedient for exciting goodwill,<sup>2</sup> and for encouraging certain acts of charity and devotion, which, perhaps, could hardly spring from purely earthly motives.

The chief use of religion, in civil and penal legislation, is to lend additional sanctity to the Oath, and so afford

Use of  
Religion  
in lending  
Sanctity to  
the Oath.

<sup>1</sup> Cf. 'If the Jew says that the Deity is absolute unity, and that it is sheer blasphemy to say that He ever became incarnate in the person of a man; and if the Trinitarian says that the Deity is numerically three as well as numerically one, and that it is sheer blasphemy to say that He did not so become incarnate, it is obvious enough that each must be logically held to deny the existence of the other's Deity. Therefore, that each has a scientific right to call the other an *atheist*; and that, if he refrains, it is only on the ground of decency and good manners, which should restrain an honourable man from employing even scientifically justifiable language, if custom has given it an abusive connotation' (Huxley's *Hume*, edition of 1879, p. 160). (C. M. A.)

<sup>2</sup> Care must be taken not to encourage the rage for erecting institutions and giving alms, which springs only too often from vulgar notions of Christianity. Such institutions do more to add to the number of the poor than to relieve them. Take, for example, the daily distributions at the monasteries in Spain and Italy. These foundations create a large class of mendicants, and their benefactions really amount to a tax on industry in favour of idleness (Dumont).

further foundations for the assurance of mutual trust and confidence among men.

An oath comprises two different bonds of obligation, the moral and the religious. One of them binds everybody; the other binds those who are of a certain way of thinking. The same formula which, in the event of perjury, purports to expose a man to religious penalties, exposes him, in the like event, to legal penalties and to the contempt of mankind. The religious bond is the most striking factor; but a main part of the force of the oath rests in the moral bond. The influence of the one is partial, that of the other general; it would therefore be most unwise to make use of the one and neglect the other.

Oaths in  
conflict  
with Public  
Opinion.

There are some cases in which an oath is invested with great authority and force—that is to say, when it is in harmony with public opinion and enjoys the support of the popular sanction. There are other cases in which it has no such force or authority—that is to say, when it is in conflict with public opinion, or, at any rate, is not supported by it. We may refer to Custom-house oaths, and such as are exacted from the undergraduates of certain Universities.<sup>1</sup>

The interest of a legislator, not less than that of a military commander, lies in ascertaining the true state of the forces which are at his disposal. To shun inspection of a weak spot because the sight of it could not yield satisfaction would amount to cowardice. And if the frailty of the religious bond of obligation has been made abundantly manifest, the blame must lie with the professors of religion themselves; for the abuse of which they have been guilty,

<sup>1</sup> Fifteen years after Dumont's issue of the *Traité de Législation* (that is to say, in 1817). Bentham published a tract to expose the mischiefs of the laws relating to the administration of oaths; it was entitled *Swear Not At All* (Bowring, v. 187-229). At Oxford, barbers, books, errand-boys, etc., were habitually sworn in English to the observance of a medley of statutes in Latin. On matriculating, Bentham was himself excused from taking the oaths by reason of his tender years (cf. also Bowring, ii. 210, and *ibid.*, vi. and vii. *passim*). (C. M. A.)

in the reckless prodigality of oaths, has brought to light the very slight efficacy the oath possesses of itself—that is to say, apart from the sanction of honour.

The force of an oath is necessarily weakened when it relates to a mere question of belief or opinion. Why is this? Because in such case it is generally impossible to detect perjury; and, further, because the human mind, ever fluctuating, ever subject to change, cannot bind itself as to the future. How can I be assured that my belief to-day will be my belief ten years hence? All such oaths constitute a monopoly granted to men little troubled with scruples of conscience, as against those who are blessed with a higher sensibility.

Oaths as to  
Belief or  
Opinion.

Oaths are degraded when applied to trifling matters, or when administered in such circumstances that they are violated by a sort of general understanding; and still more so when they are exacted in cases where justice and humanity alike treat their violation as excusable—nay, as almost meritorious.

Unjust and  
frivolous  
Oaths.

The human mind, which ever rebels against tyranny, perceives, in a confused fashion; that God, from the very perfection of His attributes, could not possibly ratify unjust or frivolous decrees. Man, in imposing such oaths as we have supposed, would therefore seem in effect to be seeking to exert authority over God Himself; for man ordains a punishment, and calls upon the Supreme Judge to execute it. Deny this hypothesis, and the religious force of the oath goes by the board.

It is passing strange that in England, the home of a people in other respects shrewd and religious, this great moving force has been almost destroyed by the trivial and unseemly use that has been made of it.

To illustrate the extent to which habit may, under certain conditions, deprave a man's moral views, I will cite a passage, extracted from a work on Education,<sup>1</sup> by

Custom-  
house  
Oaths.

<sup>1</sup> *Loose Hints on Education*, p. 362 (Dumont).

Custom-  
house  
Oaths—  
contd.

Lord Kames, a judge of the Court of Session in Scotland: 'Custom-house oaths nowadays count for nothing.'<sup>1</sup> It is not that people are becoming more immoral, but because no one any longer attaches any importance to them. The duties on French wines are the same in Scotland as in England. But, as we are not rich enough to pay them, a tacit permission to pay for French wines the duties fixed for the wines of Spain has been found more advantageous to the revenue than a rigorous application of the law. It is, however, necessary to make oath that French wines are Spanish wines, so that the duties payable on the latter kind of wines may be accepted. Such oaths were originally criminal, because they amounted to a fraud on the public; but nowadays, as the oath is nothing more than a matter of form, and implies neither the plighting nor the acceptance of any assurance or pledge, it becomes a mere manner of speaking, as in the case of the ordinary compliments of civility, *Your very humble servant*, etc. And, in point of fact, we find merchants who earn a livelihood by the use of such oaths to be men whom we trust, without any hesitation, in the most important business matters.'

Who would believe that these are the words of a moralist and judge? The Quakers have raised a bare affirmation to the dignity of an oath: a magistrate degrades the oath to the rank of a mere ceremonial formula. 'The oath implies neither the plighting nor the acceptance of any assurance or pledge.' Then why take it? Why exact it? What purpose does this farce serve? Is religion, then, the meanest of all objects? And if it is despised to this extent, why need we pay so dearly for it? How grotesque it all seems! We pay the clergy an immense sum to preach the sanctity of the oath, while our judges and legislators amuse themselves by debasing it!

<sup>1</sup> In 1835, the Lords of the Treasury were empowered to substitute *Declarations* for Oaths in proceedings connected with the Customs or any other office under Treasury control (5 and 6 Will. IV. c. 62) (C. M. A.)

## CHAPTER LXI.

### USES TO BE MADE OF THE POWER OF INSTRUCTION.

INSTRUCTION cannot be said to constitute a separate branch or subject; but the heading is convenient for the purpose of bringing to a focus a few scattered ideas.

Government ought not to try to do everything by force. Force only places a man's body at their disposal; it is by knowledge alone that they can extend their sway over his mind.

Instruction  
more po-  
tent than  
Force.

When a government issues commands, it creates in the citizen an artificial interest in obedience; but when it enlightens, it supplies him with an inward motive for obedience, the influence of which endures. The best mode of instruction is simply to publish facts; but it is at times advisable to assist the public in forming a judgment on those facts.

When we see government measures, excellent in themselves, miscarry through the opposition of an ignorant people, we feel at first indignant with the vulgar stupid herd and are disheartened in our efforts to promote the public weal. But when we come to reflect, and consider that, while such opposition might easily have been foreseen, the government, with the pride habitual to authority, took no steps to prepare the minds of the people, to dispel their prejudices, or to conciliate their goodwill, our indignation ought to be transferred from an ignorant and mistaken people to their disdainful and despotic rulers.

The folly of  
forcing a  
measure  
upon the  
people  
before they  
have been  
prepared  
for its ac-  
ceptance.

Experience has shown, contrary to general expectation, that newspapers afford one of the best means of guiding

The Public  
Press.

The Press  
—*could*.

public opinion, of quieting feverish agitations, of dissipating those untruths and lying rumours which the enemies of the State employ to compass their evil designs. Instruction, conveyed in the public press, may descend from the government to the people, or may ascend from the people to the government; and the greater the degree of freedom enjoyed by the press, the more readily can we gauge the current of opinion and the more certainly can we direct its course of action.

To realize fully the utility of newspapers, we must needs go back to the days when they did not exist, and recall the displays of imposture, both political and religious, which were exhibited with success in countries where people could not read. The last of these grand impostors, wearing royal robes, was Pugatcheff.<sup>1</sup> Would it have been possible for him to support his rôle in the France or England of to-day? Would not the deception have been unmasked in the twinkling of an eye? Indeed, there are certain crimes that are not even attempted among enlightened nations; the ease with which such impostures are detected serves to strangle them at their birth.

Instruction  
as to  
fraudulent  
practices.

There are many other snares against which the government are able to warn the people by means of public instruction. What a multitude of frauds practised in commerce, in the arts, as to the quality and price of commodities, might be put an end to altogether if the trick were but once exposed! How many are the dangerous remedies—nay, actual poisons—sold boldly by quacks as secret and wonderful cures, as to which it would be easy to disillusion the most credulous mind by simply disclosing their composition!

<sup>1</sup> Pougatschew, or Pugatscheff (Yemelka), was born, in 1726, at Simoréisk upon the Don. He was by birth a simple Cossack; but he bore a strong personal resemblance to Peter III., and pretended to be the spouse of the Empress Catherine. In January, 1775, he was taken to Moscow in an iron cage, and there killed. (C. M. A.)

How many mischievous doctrines, how many errors, some deadly, some absurd, might, too, be strangled at their birth by merely informing public opinion! When the folly of animal magnetism, after having seduced the leisured coteries of Paris, began to spread throughout Europe, a report of the Academy of Sciences, by the mere force of truth, marked Mesmer once more as the miserable charlatan that he was, and left him without a disciple, save a few incurable fools, whose admiration completed his downfall.<sup>1</sup> If you would cure an ignorant and superstitious people, send into their towns and country villages, in the character of missionaries, a number of jugglers and wonder-workers; let them begin by astonishing the people with the production of most marvellous phenomena, and end by showing them how it is done. The man who knows most about natural magic is least likely to become the dupe of magicians. I think it would be well if, subject to certain precautions, the miracle of St. Januarius were to be repeated in all the public places of Naples, and treated as one of the amusing entertainments of childhood.

The chief instruction that the government is under obligation to impart to the people is a knowledge of their laws. How can we ask that the laws should be obeyed if they are not even known? How can they be known if they are not made public in the simplest form, and in such fashion that every man may readily discover for himself what should be his rule of conduct?

The legislator may, too, exert an influence on public opinion by directing the compilation of a scheme of political morality, analogous to the body of the laws, and similarly arranged with one general code and several codes treating of special topics. The most delicate and intricate questions, arising in the pursuit of the various callings that men follow, might be elucidated therein. Nor would it be

<sup>1</sup> Mesmer visited Paris in 1778. A committee, of which Franklin and Bailly were members, denounced him as an impostor. The real value of Mesmer's work was not known when Bentham wrote. (C. M. A.)

Instruction  
as to mis-  
chievous  
errors and  
superstitions.

Instruction  
as to the  
laws, and  
as to public  
morality.

necessary that the authors should confine themselves to cold and arid instruction; for, by mingling therewith well-chosen historical anecdotes, the codes might serve as manuals of amusement for persons of every age. To compile such moral codes would be to dictate, as it were, the judgments that public opinion should pronounce on the various questions arising in politics and morals.

With a like object, there might be appended to these moral codes a collection of popular prejudices, with a statement, by way of antidote, of such considerations as should serve to correct them.

The Instructions  
of Catherine II.

If sovereign power has ever presented itself before mankind in a garb of dignity, it surely was in the *Instructions*, published by Catherine II., for a code of laws.<sup>1</sup> Let us for a moment contemplate this unique example, and keep ourselves altogether aloof from any other memory of her ambitious reign. It is impossible to gaze without admiration on the spectacle of a woman descending from the triumphal car to devote herself to the civilization of so many semi-barbarous hordes, and to offer them the noblest teachings of philosophy, sanctioned, so to speak, by the touch of her royal sceptre.

Superior to the vanity of compiling such a work herself, she borrowed all that was best in the writings of the wise men of her time; but, by adding thereto the weight of her authority, she did more for these men than they had done for her. She seemed to say to her subjects: 'You owe me the more confidence, seeing that I have summoned to my Council Chamber the most illustrious minds of the age. I do not hesitate to associate myself with these great teachers of truth and of virtue, so that they may hold me

<sup>1</sup> So early as 1779 Bentham was writing to his brother (who was in the service of Prince Potemkin) to communicate his ideas on codification to Catherine (Add. MSS., Brit. Mus., 33,538, f. 423). The sovereign who introduced a code would (so Bentham maintained) rank above all other sovereigns (cf. *Traité de Législation*, iii., p. 286). The *Instructions* were published by Catherine in the year 1765, and appeared during 1770 in French, Latin, German, and Russian. (C. M. A.)

up to shame in the eyes of the world if I dare to ignore their precepts.' Animated by the same spirit, she shared with her courtiers the labours of legislation; and if she was at times found in conflict, so to speak, with herself—like Tiberius,<sup>1</sup> who, though weary of the servility of the Senate, would yet have checked any movement towards liberty—still, these solemn engagements, contracted in the face of the whole world, had become, as it were, bounds, placed by herself on her own power, which she rarely presumed to transgress.

<sup>1</sup> Cf., e.g., Tacitus, *Annals*, book i., chap. lxxii.; and 'The promptness of its adulation (i.e., the adulation of the Senate), the proneness of its servility, he strove to check, sometimes with grave dignity, at others with disdainful irony' (Merivale's *History of the Romans*, vol. v., chap. xlv.). And even to the last his own demeanour to the Senate was marked by an air of deference: 'Paulatim Principem exseruit, præstititque, et si varium diu, commodiorem tamen sæpius et ad utilitates publicas promiorem' (Suet., *Tib.*, 29, 33). (C. M. A.)

## CHAPTER LXII.

### USES TO BE MADE OF THE POWER OF EDUCATION.

**Education  
is Domestic  
Govern-  
ment.**

EDUCATION is merely government exercised by the domestic magistrate. But if the analogies between the family and the State are such as to be apparent at a glance, the differences are less striking; and it will be worth while to direct attention to them:

**Differences  
between  
Domestic  
and Civil  
Govern-  
ment.**

(a) Domestic government must needs be more active, more vigilant, more closely concerned with detail, than civil government. Without constant attention, the family could not subsist at all. The civil authority cannot, however, do better than entrust to the prudence of the individual the control of his own personal interests, which he always understands better than the magistrate. But it behoves the head of a family to be continually on the watch to supplement the inexperience of those committed to his care.

**Domestic  
censorship.**

And here it is that censorship may be usefully exercised—a policy we have already condemned when applied by the civil government. A domestic governor may well hold back, from those subject to his rule, knowledge which might prove harmful to them; he will be right in keeping a jealous eye on their comrades and their books; he may properly hasten or retard the course of study, as circumstances suggest.

**Exertion of  
Domestic  
Authority.**

(β) The constant exertion of authority, which would be liable to such great abuses in the State, is much less so in the family circle; for, of course, the natural affection a father bears his child is far more lively than the sentiment

which unites the civil magistrate with those who are subject to his control. Nature generally prompts the parent to indulgence; while any severity he may display is ever the result of reflection.

(7) The domestic ruler is in a position to inflict punishment in many cases where a civil authority could not safely do so; the head of a family is acquainted with the individual members of it, but the legislator can only deal with men in groups or species. The one acts upon certainties; the other, of necessity, proceeds upon presumptions. A particular astronomer may, perhaps, be capable of ascertaining a ship's longitude; but can the civil magistrate know that this is so?<sup>1</sup> Is the magistrate in such a position that he could, with any show of justice, order the man to solve the problem, and in default condemn him to suffer some penalty? Now, the tutor would know whether a certain problem in elementary geometry was or was not within the grasp of his pupil. Even if idleness or obstinacy should assume the mask of incapacity, the tutor would hardly be deceived; though the magistrate, in a like case, might well go astray. So it is with many vicious habits. The public magistrate is powerless to repress them; for he could not attempt to do so without setting up a detective office in every family. But the private magistrate, having under his eyes and within reach of his hand those whom he is charged to control, may nip in the bud vicious habits, such as the laws cannot touch until they have developed, perhaps, into the wildest excesses.

(8) In particular, it is with regard to the power of reward that so much difference exists between the two governments. All the wants, all the amusements of youth may be invested with a remuneratory character by ministering to them on certain conditions—say, after such and

<sup>1</sup> Rewards of £5,000, £7,500, and £10,000 were at this time open to the discoverer of a method to find the longitude at sea. The amounts were dependent on the degree of accuracy attained (14 Geo. III., c. 66). (C. M. A.)

Domestic  
Punish-  
ment for  
Domestic  
Offences.

Domestic  
Rewards.

**Influence of  
Rewards  
during the  
period of  
Youth.**

**The Educa-  
tion of  
Youth.**

such a piece of work has been finished. In the island of Minorca the supply of food to young boys was made dependent on their skill in archery; while the honour of dining at a mess held in public was at Lacedæmon one of the prizes of virtue accorded to the youthful warriors of that city. No civil government is rich enough to be able to effect much by the employment of rewards: no father so poor as not to possess an inexhaustible supply of them.

It is the period of youth, that season of lively and lasting impressions, which the legislator ought specially to keep in view when seeking to direct the current of the inclinations towards such tastes and habits as are most conformable with the public interest.

In Russia they have contrived to enlist the young nobility in the army by expedients as effective as they are well imagined. The excellent results which have ensued are, perhaps, less clearly marked by any infusion of military ardour than by the effects produced in civil life. In this way the young nobles grow accustomed to order, vigilance, and subordination. They are obliged to quit their remote estates, where they exert a corrupting domination over the serfs, and show themselves on a larger stage, where they find equals and superiors. The necessity for association with their fellows engenders a desire to please; while the mingling of all sorts and conditions of men tends to destroy mutual prejudices, and the pride of birth is forced to bend before the gradations of the service. A system of unlimited domestic despotism, such as prevailed in Russia, could not fail to gain by its conversion into a military government which has well-defined limits. Indeed, in the actual circumstances of that empire, it would have been hard to discover any general plan of education which would have served more useful purposes.

**Reform of  
Educa-  
tional  
Methods  
by State**

But when considering education only as an indirect expedient for the prevention of crime, we see that essential reform is plainly needed. The class, in fact, most neg-

lected ought really to become the principal objects of <sup>interference</sup> care. The less the ability of parents to discharge their <sup>urgently</sup> duty in this regard, the greater the necessity for State interference. The government ought to take in hand, not only orphans left destitute, but the offspring of parents who are no longer entitled to enjoy the confidence of the law in respect to this important charge; as well as those children who have already been guilty of some offence, or who, being without a protector and without means, have become a prey to the many temptations of poverty. These classes, absolutely neglected in most countries, people the nursery from which the ranks of crime are ever being recruited.

A man of rare beneficence, the Chevalier Paulet, estab- <sup>Industrial</sup> lished in Paris an institution for the reception of more <sup>Schools.</sup> than two hundred children, chosen from the poor and vagrant classes. His scheme hinged on four cardinal principles. He resolved ( $\alpha$ ) to give the pupils a choice among many forms of study and labour, and to allow the greatest possible latitude to their various tastes; ( $\beta$ ) to engage them in mutual instruction, while offering to the scholar, as the highest reward of progress, the honour of becoming master in his turn; ( $\gamma$ ) to entrust to them the whole domestic service, and in this way to combine the double advantage of instruction and economy; ( $\delta$ ) to grant them self-government, putting each pupil under the surveillance of some older confrère, and thus to render the children, so to speak, sureties for each other. In this institution everything wore an air of cheerfulness and freedom; no punishment was inflicted other than compulsory idleness and a change of dress.<sup>1</sup> The older pupils were as much interested in the prosperity of the establishment as the founder himself, and everything pointed to complete

<sup>1</sup> Two punishments ordinarily employed were known respectively as the *little idleness* and the *great idleness*. Nothing could be more ingenious than to give chastisement the very name and character of a vice; it is easy to see what a healthy association of ideas would ensue (Dumont).

Industrial  
Schools—  
could.

success, when, amidst the general cataclysm of the Revolution, the little colony became involved in disaster.

Institutions of this nature might be founded on a larger scale, and rendered less costly, either by an increase in the number of workshops, or by keeping the pupils until they reached the age of eighteen or twenty, so that they would have an opportunity of defraying the expense of their own education and of contributing towards the maintenance of the younger scholars. If this plan were adopted, such schools might become lucrative undertakings, instead of casting a pecuniary burden on the State. But it would be necessary to give the pupils a direct interest in their labour by paying them wages at a rate nearly the same as that paid to ordinary workmen, and by accumulating their savings so as to form a fund to be handed over to them on leaving the institution.

## CHAPTER LXIII.

### GENERAL PRECAUTIONS AGAINST THE ABUSE OF AUTHORITY.

I PROCEED to the consideration of some of the means <sup>Precautions against Abuse of Authority.</sup> which governments may employ to prevent abuse of authority on the part of those to whom a share of power has been entrusted.

Constitutional law embraces alike direct and indirect legislation. The direct legislation consists in the creation of various departments or magistracies among which all political power is divided. With that branch of constitutional law this work is in no wise concerned. The indirect legislation consists in general precautions, of which the object is to insure the competence of those engaged in administration, whether as heads of departments or in subordinate positions, and at the same time to prevent any misconduct or malversation on the part of these officials.

A complete enumeration of such indirect means will not be attempted. We are simply concerned to draw attention to the subject, and, perhaps, incidentally to chill the enthusiasm of certain political writers who, having had a glimmering of one or two of these expedients, have flattered themselves that they have mastered a science which they have not even managed to sketch in outline.

I. *Divide Power into Different Branches.*—Every division <sup>Division of Power.</sup> of power is a refinement suggested by experience. The natural plan, the one that first presents itself, is to repose it altogether in the hands of a single individual. Command on the one side and obedience on the other, when the

sovereign ruler has no fellow, is a compact of which the terms are easily arranged. Among all the nations of the East, the fabric of government has retained its ancient structure. The monarchical power descends without division from stage to stage, from the highest to the lowest, from the Great Mogul to the simple Havildar. When the King of Siam heard the Dutch Ambassador speak of an aristocratic government, he burst into laughter at the notion of such an absurdity.

We point to the division of power as the foremost expedient; but we merely refer to it in general terms. To inquire as to the number of branches such a division should assume, and as to what is the best possible scheme of division, would be to indite a treatise on constitutional law. I will only observe that the division must not involve the creation of separate and independent powers, for that would lead to a state of anarchy. It is always necessary to recognize some authority superior to all others, which does not receive law, but gives it, and retains supreme control even over the very rules it has itself laid down to regulate its own mode of action.

Distribu-  
tion of each  
Branch of  
Authority.

2. *Distribute the Several Branches of Authority, Each One among a Number of Participants—Advantages and Demerits of this Policy.*—Prior to the reforms introduced by Catherine II., each of the different branches of power throughout the Russian provinces—whether military, fiscal, or judicial—was entrusted to a single body, a single council. So far the constitution of these subordinate governments was very much in the nature of an Oriental despotism; but the authority of the governor was somewhat limited by the powers of the council, and in this particular the constitution resembled rather that of an aristocracy. Nowadays the judicial power is separated into several branches, and each branch divided among many judges, who exercise their functions conjointly. A law, prescribing a procedure in the nature of the English process on the issue of a writ

of *habeas corpus*, has been established for the protection of individuals against arbitrary power; and the governor no more enjoys *jus nocendi* than a governor of Jamaica or Barbadoes.

The advantages of such division are principally these: Advantages  
of Distribu-  
tion.

(a) It diminishes the danger attendant on precipitate action.

(β) It diminishes the danger that arises from ignorance.

(γ) It diminishes the danger to be apprehended from a want of probity.

This last advantage, however, will not always be secured unless the number of participants be large; that is to say, unless the number be such that it would be difficult to distinguish the interests of the majority from the interests of the people as a whole.

But this division of power has also certain disadvantages, Disadvan-  
tages of  
Distribu-  
tion. inasmuch as it entails delays, and tends to foment quarrels which may lead to the dissolution of the government. We may, however, mitigate the evil of such delays by graduating the division, according as the functions to which we apply it admit of more or less deliberate action; and in this regard legislative power and military power occupy the two extremes, the one admitting the greatest deliberation, the other requiring the utmost despatch. As to the dissolution of government, that constitutes an evil only on one or other of two suppositions—(α) That the new government is worse than the old one; or (β) that the transition from the one to the other is marked by the calamity of civil war.

The gravest danger arising from plurality, whether in a Lessening  
of Respon-  
sibility. judicial tribunal or in an administrative council, is that responsibility is lessened in a variety of ways. A numerous body may reckon on some sort of deference being paid to it by the general public, and so will lend itself to acts of injustice such as a single administrator would not dare to perpetrate. Where there is a confederation of many persons, any section may always cast on their fellows the

odium of adopting a particular measure; everybody did it, nobody avows it. Should public censure be aroused, the greater the number of persons, the more strongly are they fortified against outside opinion, the more pronounced their tendency to form, as it were, a state within a state—a little community, with a special and peculiar public opinion of its own, protecting by its applause such of its members as may have incurred reproach.

Unity  
generally  
desirable.

Unity, as distinguished from plurality, in every case in which it is possible—that is to say, in every case which does not involve the necessity for a reconciliation of divergent views, or the co-operation of different minds, as in a legislative body—unity, I say, is desirable because it casts the whole responsibility, whether legal or moral, upon the head of a single individual. Such an one is not called upon to share with others any glory that may attach to his actions; but at the same time there falls upon him the whole burden of blame. He finds himself standing alone, having no support other than the integrity of his conduct, no defence other than the respect and esteem of his fellows. Though he were not upright by natural disposition, he becomes upright, so to speak, in spite of himself, by virtue of a situation in which interest is found to be inseparable from duty.

Advantages  
of Unity in  
Subordin-  
ate Ap-  
pointments.

Besides, in the case of subordinate appointments, unity affords to the dominant authority a sure and certain means of discovering the true capacity of individuals in a very short time. When the company is large, a shallow and limited mind may escape detection for a long while; but if an official act alone and on a public stage, the sham is speedily unmasked. Men of little or no ability, ever ready to solicit posts in which they can seek shelter behind more capable colleagues, are afraid to hold any office that involves them in constant peril of betraying their real incapacity.<sup>1</sup>

<sup>1</sup> The test now largely adopted for subordinate officials is that of 'competitive examination' in literary, and to some extent scientific, subjects. This method secures the rejection of conspicuously unintelli-

But in certain cases it is possible to reconcile the advantages accruing from a confederation of officials with those which necessarily attach to the responsibility of a single individual. In subordinate councils there is always a presiding chairman who enjoys a larger measure of trust than his colleagues. He is associated with others in order that he may profit by their advice, and that they may serve as witnesses against him in the event of his deviating from the path of duty. But to secure these objects it is by no means necessary that his fellows should be his equals in point of authority, nor even that they should enjoy a right of voting. It is merely necessary that the chief should be bound to communicate to them all his actions, and that each of them should, on every occasion, make a written declaration testifying approval or disapproval. The communication to his colleagues should, in ordinary cases, be made before the issue of an order by him; but in cases demanding a high degree of despatch it would suffice to make it immediately afterwards. Would not such an arrangement as this serve to obviate the dangers arising from dissension and delay ?<sup>1</sup>

The Device of appointing a President. The East India Company.

3. *Place the Power of Removal and the Power of Appointment in Different Hands.*—This idea is borrowed from an ingenious pamphlet published in America in 1778,<sup>2</sup> written by a deputy of the convention appointed to examine the form of government proposed for the State of Massachusetts.

Power of Removal and Power of Appointment to be in different hands.

gent candidates for office; but it is thought by some, who have marked the distinction obtained by 'rejected' candidates in the various walks of life, to lead to the exclusion of many able men who have no mind for 'the sweet serenity of books.' (C. M. A.)

<sup>1</sup> This is the plan adopted by the East India Company. Formerly the Council of Madras or Calcutta decided everything by a plurality of votes; nowadays the Governor must consult the Council, each member giving a written opinion; but the members no longer vote on the various measures, they are simply advisers. The Governor decides everything in the last resort. He cannot, therefore, by securing a majority in the Council, evade the responsibility which rests wholly on himself (Dumont).

<sup>2</sup> Reprinted in Almon's *Remembrancer*, No. 84, p. 223 (Dumont).

A man's pride impels him not to condemn his own choice. Quite apart from any personal bias, a superior officer will be less disposed to listen to complaints against one of his own nominees than would a wholly indifferent person, and he will, too, have a prejudice in favour of the accused arising from *amour-propre*. This consideration will serve, to some extent, to explain those abuses of power so common in monarchies, when a subaltern is invested with great authority, of which he is not called upon to render any account, save to the very man who conferred office upon him.

In popular elections, the part played by any particular individual in the nomination of a magistrate is so slight that this sort of self-deception or bias can hardly arise.

In England the choice of Ministers rests with the King; but Parliament can effectively displace them by putting them in a minority. This, however, is only an indirect application of the principle.

Removal of  
Governors  
from one  
District to  
another.  
Advantage  
of Change.

4. *Do not permit a Governor to remain long in the Same District.*—This principle has a special application to considerable governments in distant provinces, and in particular when they are detached from the main governing body of the Empire.

If afforded time and opportunity, a governor, armed with great authority, may very possibly seek to establish his independence. The longer he retains office, the greater his chances of strengthening himself by creating a party of his own, or by acting conjointly with some party already in existence. Hence there may well arise oppression towards some, partiality towards others. And, although he have no party, he may yet be guilty of a thousand abuses without anyone daring, or attempting, to complain to the Sovereign. The lasting character of his authority begets hopes and fears, which are alike calculated to advance his projects. Some men he makes his creatures, and they look to him as the sole bestower of favours; while those who suffer under him dread further suffering, if they

should give offence to a chief whom they cannot expect to see removed for many a long day. This consideration is specially important in connection with offences hurtful to the State rather than to individuals.

The *disadvantage* of rapid changes consists in depriving a man of his employment just when he has acquired a knowledge of, and experience in, the duties incidental to his office. New men are wont to err through ignorance. This inconvenience might be mitigated by the establishment of a permanent and subordinate Council to maintain the course and routine of the duties on uniform lines. What you would gain by change is the lessening of a power that might be exercised to your hurt; what you risk is a lessening of the skill displayed in discharging the duties of the office. There is no comparison between these considerations, when rebellion is the evil to be apprehended.

Disadvantage of Rapid Change.

But the Advantage outweighs the Disadvantage.

All arrangements involving rapid changes should be permanent, so as to avoid any possibility of giving umbrage to individuals. Men's minds must be accustomed to look upon a fresh appointment, at fixed intervals, as certain and necessary. If the plan were adopted only on occasion, it might serve to provoke the very evil it is designed to prevent.

The danger of revolt on the part of provincial governors hardly arises, however, unless the home government be weak or ill-constituted. In the Roman Empire, from Cæsar to Augustulus, there was a succession of governors and generals, who constantly raised the standard of revolt and independence.<sup>1</sup> This was not due to any neglect of the precaution of which we have just been speaking, for changes were frequent enough; but whether it was that the home government did not know how to make use of the safeguard, or whether there was a lack of firmness and vigilance on their part, or whatever the cause may have been, they could never prevent repeated acts of rebellion.

The case of the Roman Empire.

<sup>1</sup> For example, the revolts of C. Julius Vindex, Governor of the Farther Gaul, and of Galba, Governor of the Hither Spain, which led to the fall of Nero in A.D. 68. (C. M. A.)

The case of  
the Turkish  
Empire.

The want of some permanent arrangement of this nature is the most obvious cause of the constant revolts to which the Turkish Empire is subject, and nothing more clearly displays the stupidity of that barbarous Court. If there be any European countries which ought, above all others, to adopt this policy, they are Spain in respect to her American colonies, and England in respect to the government of the East Indies.

Provincial  
Revolts  
rare in  
civilized  
countries.

But in the more highly civilized parts of Christendom nothing is rarer than the revolt of a governor. That of Prince Gagarin, the Governor of Siberia under Peter I., is, I believe, the only example that can be cited during the last two centuries; and it occurred in an empire which has not even yet lost its Asiatic character. Such revolutions as have, in fact, broken out owed their origin to something more potent and more significant than the continuance in office of a particular governor—the opinions and sentiments of the people, and their passion for freedom.

Renewal of  
Governing  
Bodies.  
Importance  
of Change.

5. *Renew Governing Bodies by Rotation.*—The reasons for not allowing a governor to remain long in office all apply, with even greater force, to a Council or to a body of Directors.

Make them permanent; and, if they agree together as to the generality of their measures, it is probable that those measures will embrace many of which the object is to promote the interests of themselves and their friends, at the expense of the community which has reposed its confidence in them. So, too, if the Council or Directorate chance to be divided in opinion, and afterwards become reconciled, it is likely enough that their accord has been purchased at the expense of the community whom they represent. But if, on the other hand, you get rid of a certain number of them at regular intervals, you have a chance of seeing any abuses reformed by the new-comers, who have not as yet had time to be corrupted by their associates. Some of the old members should always be

left, so that the course of business may run on uniform lines; but ought they to be greater or less in number than the new-comers? If greater, there is reason to fear lest the old corrupt system should still persist; if less, there is reason to fear lest a good working scheme of administration should be destroyed by capricious innovation. However this may be, the mere right to remove or dismiss an individual member will hardly ever serve the purpose, especially if the power to fill vacancies be assigned to the body itself. Such a right would never be exercised save on some extraordinary occasion.

Ought those members who retire to be ineligible for re-election permanently or for a time only? If for a time, it will soon be the regular practice to re-elect, and the body will become, as it were, a close corporation; if permanently, the community may be deprived of the talents and experience of its ablest servants. Upon the whole, therefore, this expedient would seem only an imperfect substitute for other expedients to which we shall presently refer, and especially the giving of publicity to all proceedings and to all accounts.

The arrangement of retirement by rotation has been adopted in England for large commercial undertakings; and it was introduced some years ago into the directorate of the East India Company.

The point of view of policy is not the only one from which the practice of rotation has been regarded. It has often been followed for the mere purpose of bringing about a more equitable distribution of the privileges that appertain to office.

Harrington's great political work (*Oceana*) turns almost entirely on a system of rotation among the various members of the government.<sup>1</sup> An able man, who does not grasp the

<sup>1</sup> The *Oceana*, published in 1656, was written by James Harrington (1611-1677), who was educated at Trinity College, Oxford. This work propounds a scheme for a doctrinaire republic on aristocratic lines, and contains an appeal to Cromwell to reorganize the government. (C. M. A.)

full scope of a science, is apt to seize on a single idea, to develop and apply it in every direction, but to see nothing beyond it. It is thus that, in medicine, the less one appreciates the vast scope and extent of that art, the more is one inclined to believe in an elixir of life, in a universal remedy, in some secret and marvellous cure. The use of classification consists in bringing the eyes to bear on all the various expedients, one after another.

Allowance  
of Secret  
Informa-  
tions.

6. *Allow Secret Informations to be laid and received.*—

Everyone knows that secret informations were received in Venice. Here and there around the palace of St. Mark boxes were placed and their contents examined, at regular intervals, by the State inquisitors. It has been alleged that, on the strength of these anonymous accusations, and without any further proof, people were arrested, imprisoned, and sent into exile, or even punished with death. If that were true, there is nothing that could be more salutary or more reasonable than the first step of the process—nothing that could be more pernicious or more outrageous than its later stages. The arbitrary tribunal of the Inquisition has cast a merited stain on the Venetian government, which must have been in other respects marked by prudence and wisdom, seeing that for so long a time it maintained itself in a condition of prosperity and peace.

Procedure  
after the  
Informa-  
tion has  
been laid.

It is a great misfortune when a good institution finds itself closely allied with a bad one; for it is not every eye that can make use of the prism which serves, so to speak, to separate the colours. Wherein lies the harm of receiving secret informations, even although they may, in some instances, be anonymous? It is doubtless true enough that, merely on the strength of a secret information, not a single hair of a man's head should be touched, not the slightest uneasiness should be caused to any living soul; but, subject to this reservation, why forgo any advantage that may accrue therefrom? It will be for the magistrate to determine whether the object denounced

is worthy of his attention, and if such be not the case he will treat the information as naught ; but should the matter seem to merit inquiry, he will direct the informant to appear in person, and if, after investigation, it is found that the man has made a mistake, he may be dismissed with a word of commendation for his good intentions, and his name may remain undisclosed. If, however, the informant has preferred a false and malicious charge, and his identity is known or can be discovered, both his name and the nature of his accusation ought to be conveyed to the person accused. In case the denunciation is well founded, judicial process will be instituted, and the informant compelled to bear public testimony in the courts.

Suppose it be asked, On what principle can such proceedings prove advantageous ? I reply, On precisely the same principle as is applied to the vote by ballot. During the pendency of the prosecution, it is certainly very necessary that the accused should be supplied with the names of the witnesses who are to give evidence against him ; but where is the necessity for his knowing them before the hearing is begun ? If, indeed, the names were made known to the supposed culprit, a witness who had anything to fear from him would not expose himself to a certain embroilment, on the mere chance of possibly rendering a public service. It is in this kind of way that offences so often go unpunished, because people are unwilling to make personal enemies, in the absence of any positive assurance that their evidence will benefit the public.

I have dealt with this expedient under the head of abuses of authority, for it is as against officials that its efficacy is most conspicuous, inasmuch as the power of the alleged delinquent, in such cases, adds to the dissuasive motives—one weight the more to press down the balance.

The determination to receive secret, and even anonymous, informations would amount to nothing unless it were made publicly known ; but, once known, the dread of

Advantage  
of Secrecy  
in the  
earlier  
Stages.

This Ex-  
pedient  
specially  
useful as  
against  
Officials.

such informations would soon render the occasion for them more rare, and in that way would lessen their number. And upon whom would fear fall? Why, only upon the guilty, or upon those who were projecting crime; for, with publicity of procedure, innocent folk could never be really put in peril, while the malice of false accusers would be confounded and meet with condign punishment.

Petitions  
addressed  
personally  
to the  
Sovereign.

7. *Petitions addressed personally to the Sovereign: Selection by Lot.*—Even when petitions or informations go no farther than the Minister, they may have their use, but to assure their utility they must needs come to the knowledge of the Sovereign.

Frederick the Great received letters from the meanest of his subjects, and the reply was often written with his own hand. This circumstance would seem incredible were it not thoroughly well attested. But it must not be concluded, on the strength of this example, that the same thing would be possible under every form of government.

In England everyone is free to present a petition to the King; but the fate of these same petitions, handed over in bundles to a Gentleman of the Chamber, has become proverbial: they serve, it is said, as curl-papers for the Maids of Honour. After this, it is easy to understand that such petitions are not very numerous; but neither are they very necessary in a country where the subject is protected by laws that do not depend upon the Sovereign.<sup>1</sup> For the private individual there are other means of obtaining justice; for the King there are other channels of information.

Especially  
important  
in Absolute  
Monarchies.

It is in absolute monarchies that it becomes imperative to keep constantly open some means of communication between the subject and the prince; this is essential in order that the subject may be assured of protection, and

<sup>1</sup> The 'offence' of *Tumultuous Petitioning* was dealt with by 13 Car. II., st. 1, c. 5, under severe penalties. By that statute it was provided that no petition shall be delivered by a company of more than ten persons, and many other restrictions were imposed. (C. M. A.)

the monarch of freedom from any chicanery on the part of his ministers.

You may call the people 'canaille,' 'populace,' or what you will; but the prince who refuses to lend an ear, even to the meanest of his subjects, so far from increasing his power thereby, in fact loses influence and authority. From that moment he is deprived of the capacity of directing his actions by his own will, and becomes a mere instrument in the hands of those who dub themselves his very humble servants. He may suppose that he does what he likes, that his decisions are entirely his own; but, in point of fact, it is they who decide for him, for to determine all the causes which impel a man to act is to determine all his actions. He who sees and hears only what it pleases those around him to suffer him to see and to hear is the creature of every impulse they are minded to impart to him.

To place unlimited confidence in ministers is to place unlimited confidence in the very men who have the greatest interest in abusing it, and the best opportunity of so doing. As to the minister himself, the more upright he is, the less will he need such confidence; and we may assert, without paradox, that the more he deserves it, the less will he desire to possess it. The Sovereign, who is unable to read all these petitions without sacrificing precious time, may have recourse to various expedients to extricate himself from dependence on his courtiers, and to assure himself that the most important documents are not withheld from him. He may take some at hazard; he may cause them all to be distributed under divers heads, and have them presented to him without giving any time for selection. The details are not of sufficient importance or difficulty to demand special development; it is enough to suggest the idea.

Folly of placing unlimited Confidence in Ministers.

8. *Give Liberty to the Press.*—Hearken to advice whence-soever it may proceed; you may find yourself the better

Freedom of the Press. Its marked Utility

Freedom of  
the Press—  
contd.

for it, and you run no risk of being any the worse. What does plain common-sense tell you? That to establish the liberty of the press is to accord a hearing to the advice of everybody. It is no doubt true that, on many occasions, public judgment is not pronounced before a particular action has been determined upon, but only after it has been executed. Still, this judgment may always prove useful, either in connection with legislative measures that may be reformed, or in connection with administrative measures that may be repealed.<sup>1</sup> The best advice given privately to a minister may be completely thrown away; but good advice given to the public, though it does not influence one man, may well influence another; though of no avail to-day, it may yet prove very useful to-morrow. If the form in which it is presented be not attractive, other hands may dress it and impart a relish that makes it quite palatable. Instruction is a seed which must be tried, so to speak, in a variety of soils, and cultivated with patience, for its fruits are often slow of growth, and it is long before they reach maturity.

Effect on  
the Sover-  
eign.

Freedom of the press is far preferable to petitions as an expedient for extricating the Sovereign from the control of his courtiers. However keen his discernment in the selection of ministers, he can only have a small group of candidates to choose from—men presented to him by the chances of birth or fortune. He may, therefore, well conceive the existence of more enlightened men; and increased opportunities of acquaintance and intercourse with such men, through the medium of the press, will serve to enhance his authority and extend his freedom of action.

Difficulty  
arising  
from Abuse  
of Right of  
Criticism.

But expressions of opinion in the press and elsewhere may be mingled with outbursts of insolence and ill-temper.

<sup>1</sup> 'In Russia disquisitions on legislation are not only permitted, but encouraged. . . . As much pains has been taken to make men think as in some governments [Bentham had at first written 'in France'] to prevent them thinking' (MSS. University College, No. 87; cited Halévy, i. 365). (C. M. A.)

Instead of confining itself to an inquiry into measures, criticism may extend to persons. And, indeed, what prodigious skill would be needed to keep the two courses distinct! How is it possible to censure a measure without, in some degree, attacking the judgment or probity of its author? This is the stumbling-block: this is the circumstance which makes the liberty of the press so rare, though its advantages are so manifest. It has ranged against it all the fears that spring from *amour-propre*. Yet Joseph II.<sup>1</sup> and Frederick II.<sup>2</sup> had enough magnanimity to establish it: it exists in Sweden; it exists in England; it might exist everywhere, with such reservations as would be necessary to check its gravest abuses.

If, owing to government usage or other special circumstance, the Sovereign is unable to suffer free examination of administrative action, he ought at least to permit free examination and discussion of the laws. Let him assume for himself, if he will, the privilege of infallibility; yet there is no need to claim it for his predecessors. Or, if he be so jealous of the supreme power as to insist on the reverential treatment of everything which has ever been touched by the royal sceptre, he might at least leave open to free discussion merely scientific subjects, such as the principles of law and procedure, and questions of subordinate administration.

Even allowing that certain inconveniences attach to complete liberty of the press, when extended to pamphlets and leaflets scattered broadcast among the people, and addressed alike to the enlightened and to the unlettered portion of the nation, the same reasoning cannot apply to serious and long-winded works—to books that can only reach a certain class of readers, and must, as they cannot

<sup>1</sup> The Hapsburg Emperor, Joseph II., reigned from 1765 to 1790. He is the monarch referred to in the 'Principles of Legislation,' chap. ix., § iii., *ante*, vol. i., p. 63. (C. M. A.)

<sup>2</sup> Frederick II., King of Prussia (the Great), reigned from 1740 to 1786. (C. M. A.)

Abuse of  
Right of  
Criticism—  
could.

Certain  
subjects, at  
any rate,  
should be  
open to  
Free Criti-  
cism.

produce any immediate effect, always give opportunity for the preparation of an antidote.

Under the ancient French régime, it was enough that a book on moral science had been printed in Paris to raise a strong prejudice against it. The *Instructions* of the Empress of Russia, addressed to the Assembly of Deputies, was prohibited in France: the style and the sentiments of the document leaned so much to the popular side as to be intolerable in that monarchy.<sup>1</sup>

It is true that, in France as elsewhere, negligence and occasional acts of inconsistency mitigated the evils of despotism. A foreign title would serve as a passport to genius. Indeed, the rigour of the censorship served only to drive the trade in books out of the country, and to render more bitter the satire it was intended to suppress.

Publication  
of Reasons,  
etc., for  
Laws and  
Adminis-  
trative  
Action.

9. *Publish the Reasons and the Facts which serve as a Foundation for Laws or Administrative Action.*—This is an essential link in the chain of a generous and magnanimous policy, and an indispensable accompaniment to the liberty of the press. The government owe to the people an obligation to found one of these institutions; the obligation to found the other they owe to themselves. For if they disdain to supply information as to the motives that prompt their actions on important occasions, they thereby announce their intention to rely solely on force, and to reckon as naught the wishes and opinions of their subjects.

Opposition  
by advo-  
cates of  
arbitrary  
authority.

The advocate of arbitrary power does not share this view. He has no mind to enlighten the people, though he scorns them because they are not enlightened. You are unfit to form a judgment, says he, because you are in a state of ignorance; and you shall be kept in a state of ignorance, so that you may not become fit to judge. Such is the vicious circle in which he is everlastingly constrained to move. Now, what is the consequence of this contemptible policy? There springs up general discontent, which

<sup>1</sup> Cf. note, *ante*, p. 298. (C. M. A.)

gradually increases in force: it is based sometimes on false and exaggerated rumours, accepted as well founded because there is no opportunity to examine or discuss them. Some minister makes complaint of the injustice of the people, forgetting that he has not given them a chance of being just, and that misconceptions as to his conduct of affairs are a necessary consequence of the mystery in which it is shrouded. If we are to be systematic and consistent, there are but two ways of dealing with men: absolute secrecy or perfect frankness. We must exclude the people altogether from any knowledge of affairs, or we must accord to them the greatest possible measure of knowledge; we must debar them from forming any judgment whatever, or place them in a position to form the most enlightened judgment; we must either treat them as children or treat them as men. Between these two methods a choice must be made.

Opposition  
to Publishing  
—contd.

The first plan was adopted by the priests of ancient Egypt, by the Brahmins in Hindostan, by the Jesuits in Paraguay;<sup>1</sup> the second has, in practice, been followed in England, but it is established by law only in the United States of America. Most European governments oscillate continually between the one and the other, without having the courage to attach themselves exclusively to either; and they are never weary of putting themselves in conflict with themselves, by mingling, in hopeless confusion, a quite honest desire to see their subjects enlightened and industrious, with a painful dread of fostering the spirit of investigation and discussion.

In many branches of administration it would be useless, and, indeed, might be dangerous, to publish in advance the grounds upon which it has been resolved to adopt a particular course; we need only do so in cases where it is necessary to enlighten public opinion, lest it should go astray. But in matters of legislation the principle is

The Principle is  
always  
applicable  
in matters  
of Legislation.

<sup>1</sup> Cf. note, 'Civil Code,' Part I., chap. xi., *ante*, vol. i., p. 160. (C. M. A.)  
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Publication  
of Reasons  
for a Law—  
contd.

always applicable. It may be laid down as a general rule that no law ought ever to be enacted without some reason being expressly assigned or tacitly understood; for what is a good law if it be not a law for which good reasons can be given? There must, of course, have been some reason, good or bad, for enacting it, since there can be no effect without a cause. But once compel a minister to assign his reasons for a measure, and he will be ashamed not to have some good ones to give: he will be ashamed to tender you base coin, if obliged to place alongside it the touchstone whereby its soundness may be tested.

This is, moreover, an expedient by which a Sovereign may continue to reign even after death. If the reasons for his laws are good, he gives them support of which they can never be deprived. His successor will be constrained to maintain them for the sake of his own good name; and, thus, the more happiness the lawgiver bestowed in his lifetime, the greater the amount of happiness that he has assured to posterity.

Prohibition  
of Arbitrary  
Process.

10. *Forbid Arbitrary Process.*—‘Clotaire,’ says Montesquieu,<sup>1</sup> ‘made a law that an accused person should not be condemned without being heard; and this shows that a contrary practice prevailed in particular cases or among some barbarous peoples.’

‘Lettres  
Cachet.’

Montesquieu did not dare to tell the whole truth. Is it possible that he could have written this passage without

<sup>1</sup> *Espirit des Loix*, chap. xii. In England the Habeas Corpus Act of 1679 (31 Car. II., c. 2) conferred on every prisoner the right to have the legality of his detention speedily raised and determined by a superior Court. An abuse of authority in this regard is therefore, practically impossible save in some very rare and exceptional circumstances; but ‘the case of *ex parte F. D. Marais* ([1902], A. C. 109), which is not binding on English Courts, makes it doubtful,’ writes Mr. E. Jenks, in his *Short History of English Law*, p. 343, ‘whether this statement is true of the colonies.’ The civil remedies in case of abuse or irregularity were established by the decisions of the eighteenth century, which declared the illegality of the issue of General Warrants (*e.g.*, *Wilkes v. Wood*, 19 St. Tr., 1153). Those decisions also served to show ‘how little force there is in mere official precedents, however numerous the train of them, and however ancient the commencement of it’ (see Bentham’s *Plea for the Constitution*, etc., Bowring, vol. iv., p. 261). (C. M. A.)

recalling the *lettres de cachet* and the police administration of his own time? A *lettre de cachet* may be defined as an order to inflict punishment without any evidence, for doing something which is not forbidden by any law.

<sup>1</sup> *Lettres de Cachet* — could.

It was in France and at Venice that this abuse prevailed to the most outrageous extent. The governments of those communities, moderate in other respects, brought reproaches on themselves by this piece of folly. In this way they became subject to imputations, which were often baseless, and to all the reaction of terror; for there are certain precautionary measures that themselves become a source of danger, by reason of the alarm they create in the public mind. Behave well, it is said, and the government will never become hostile to you. This may be so, but how can I be sure of it? Perhaps I am disliked by the minister or by his valet, or by the valet's valet. If I am not hated to-day, I may be to-morrow; or somebody else may be, and I may be mistaken for that somebody else. My safety does not depend upon my conduct, but upon the view that men more powerful than I am happen to take of my conduct. Under Louis XV. there was a regular traffic in *lettres de cachet*. If that could take place under a government which passed for a mild one, what would be the consequences of the existence of such a process in a less civilized country? If justice and humanity will not avail to abolish these relics of barbarism, I should have thought that the pride of governments would itself have been enough to secure their abolition.

Such an expedient may have been adopted originally under the veil of statecraft, but in our days the specious pretext has lost its spell. The first thought which presents itself to the mind is that of weakness and incapacity on the part of the men who resort to it. If you had the courage to listen to what the prisoner has to say, you would

not close his mouth; it is because you are afraid of him that you enforce his silence.<sup>1</sup>

Prescription of Rules and Forms as to the Exercise of Authority.

II. *Direct that Authority should be exerted in Accordance with Certain Rules and Forms.*—This is another head of police administration in connection with subordinate offices, not less applicable to absolute monarchies than to mixed governments. If the Sovereign conceives it to be to his interest to remain outside and above the laws, it is certainly not to his interest to confer the like independence on all his agents.

The laws which delimit the exercise of powers by subordinate officers may be separated into two groups: (a) Those which limit the cases in which it is permitted to exercise such and such a power; and (β) those that prescribe the formalities to be observed in the exercise of the power. These cases and these formalities ought to be specifically enumerated in the text of the law; and, this being done, the citizens ought to be informed that these are the cases, and the only cases, in which their security, their freedom, their property, or their honour, can be lawfully assailed. We thus see that a general code should begin with a law in favour of liberty—a law which should restrain delegated powers, and strictly limit their exercise to such and such particular occasions and for such and such specific causes. This was the intention of Magna Charta, and would, indeed, have been its effect but for such vague and unfortunate phrases as *lex terræ*, etc.<sup>2</sup> Dependence on an imaginary law of this kind plunges everything into uncertainty again; because men, constantly referring to the usages of ancient

<sup>1</sup> This does not apply to extraordinary circumstances, such as attend the suspension of the Habeas Corpus Act in England, with well-recognized precautions (Dumont).

<sup>2</sup> The famous [39th] chapter, e.g., runs: 'Nullus liber homo capiatur, vel imprisonetur, aut dissolviatur [de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis], aut utlagetur, aut exulet, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum VEL PER LEGEM TERRÆ . . .' See cf. McKechnie on *Magna Carta* (at pp. 102, 440), as to the possible meaning of *lex* in this connection. (C. M. A.)

times, seek out precedents and authorities from among the very abuses which the statute was intended to prevent.

12. *Establish the Right of Association—that is to say, the Right of Citizens to unite or assemble for the Expression of their Views and Desires as to the Public Measures of the Govern-*

*The Right of Combination and Public Assembly.*

*ment.*—Among the rights which a nation should reserve on founding a government, this stands first, as being the basis of all the others. But it is almost unnecessary to deal expressly with it; for the peoples who possess it need hardly be urged to safeguard it, while those who possess it not can have little hope of obtaining it—for what could ever induce their rulers to confer it upon them? At the first blush, this right of combination would seem almost incompatible with the maintenance of government; and it must be allowed that the assertion of such a right as an expedient for controlling the government would be at once contradictory and absurd. But the position is really

very different from this. In case the slightest act of violence be perpetrated by any one or more members of the association, punish it as though committed by any other individual. If you should find that you have not strength enough to punish it, that in itself is a proof that the association has made an advance it could not have made without just and adequate cause; so that either the association is not an evil at all, or it is a necessary evil.

*Acts of unlawful violence should be sternly repressed.*

I assume that you possess a public force, an authority thoroughly well organized. If, then, these associations have become sufficiently powerful to intimidate you, surrounded as you are by all your regular expedients for exercising control; if you have not formed associations on your side—you who enjoy such opportunities of obtaining a superiority in that regard—why, is not this a sure and certain sign that the calm and considered judgment of the nation is against your government? That being conceded, what reason can be assigned for keeping things as they are, for refusing to yield to the will of the people

*But the government should yield to the will of a vast majority.*

in this particular matter ? I confess that I can find none. It is doubtless true that a nation, composed as it is of frail human beings, is far from enjoying the advantage of infallibility; a nation may be deceived as to its true interests, just as its rulers may—nothing can be more certain; but if the vast majority of a nation be found to be on one side, and its government on the other, may it not fairly be presumed, *prima facie*, that this widespread discontent rests on some solid foundation ?

Right of  
Combina-  
tion and  
of Public  
Meeting  
tends to  
avert In-  
surrections.

Far from being an efficient cause of insurrection, I regard such associations as constituting one of the most potent means for averting that great peril. Insurrections are the convulsive throes of a weakness which gathers strength only from some momentary impulse of despair; they are the efforts of men who have not been allowed to give vent to their feelings, or of men whose projects would have had no chance of success if their intentions had become generally known. Conspirators, in conflict with the common sentiment of a nation, can never prevail save by violence or surprise; their sole hope lies in forcible measures. But, on the other hand, men who feel assured that the people are on their side—who flatter themselves that public opinion alone would secure their triumph—will not employ violence. Why should they do so ? Why should they, without reaping any advantage, incur grave and manifest peril ? I am, indeed, persuaded that men who enjoy full liberty of association, and exercise that privilege under the protection of the laws, will never resort to rebellion save in those rare and unhappy cases in which it becomes necessary so to do; or, to put the matter in a nutshell, I am persuaded that, whether the right of association be granted or withheld, it will not affect the breaking out of any open and general rebellion.

The associations which were openly formed in Ireland during the year 1780 did not produce any evil results; nay, they even served to maintain peace and security, although

that country, then but half civilized, was distracted by every circumstance of strife and civil war.<sup>1</sup>

I go so far as to believe that associations might be permitted in the most absolute monarchies, and there become one of the principal means of government. These communities, more than others, are tormented by uprisings and rebellion; everything is accomplished by some sudden and unexpected movement. The right of combination would allay such disorder. If the subjects of the Roman Empire had been wont to form associations, the Empire and the lives of the Emperors would not have been so persistently put up at auction by the prætorian guards.

At the same time, I fully recognize that the right of union and assembly cannot be conceded to slaves. We have been guilty of far too much injustice towards them not to have everything to fear from their ignorance or their resentment. It is not, then, in the West Indies or in Mexico that the people may be given arms and permitted to form associations; but there are European States in which such a bold and generous policy might well be adopted.

When it would be perilous to allow Right of Combination.

I feel, too, that there is a degree of ignorance which would render associations perilous. This proves that ignorance is a great evil, but it in no wise proves that associations are not a great good. Besides, the right of association may itself serve as an antidote against its own ill effects. In proportion as an association gains in extent, all the reasons for its foundation form the subject of discussion, the public is enlightened, and the government has at command the means of disseminating a knowledge of the true facts and of dissipating error. Liberty and instruction go hand in hand. Liberty facilitates a knowledge of the facts, while the advance of knowledge represses the extravagancies of liberty.

<sup>1</sup> In this year (1780) Grattan and the Irish Volunteers demanded Home Rule, subject to the control of the Crown. (C. M. A.)

Establishment of the Right ought not to cause Disquiet to the Government.

I do not see why the establishment of this right should cause any disquiet to a government. There is no government which has not a wholesome dread of the people; there is none which does not think it necessary to consult their wishes and accommodate itself to their views. It would seem, too, that the most despotic are the most timid. What Sultan is so much at ease, so secure in the exercise of authority, as an English King? The janissaries and the populace make the seraglio tremble, while the seraglio in turn makes the janissaries and the populace shake in their shoes. In London the voice of the people makes itself heard in lawful assemblies; at Constantinople it finds expression in the form of outrage. In London the people relieve their feelings by presenting a petition; at Constantinople, by setting the city ablaze. Poland, where associations have wrought so much evil, may perhaps be cited to confute me. But the objection rests on a misapprehension. The associations were begotten of anarchy, not anarchy of the associations. Besides, in describing this expedient as a check upon governments, I necessarily suppose the existence of a government; I am speaking of a curative drug, not of an article of ordinary diet.

Circumstances may arise for regulating the Exercise of the Right of Meeting.

I must, however, add that, even in States where this right is already established, circumstances may conspire to make it desirable, not to suspend it entirely, but to regulate its exercise. In this regard no absolute or inflexible rule is needed. During the course of the late war with France, we have seen the British Parliament restrict the right of assembly, by forbidding meetings for a political object, unless the object were publicly proclaimed and the meeting authorized by magistrates who had power to dissolve it.<sup>1</sup> These restrictions were imposed at the very time when the citizens were being called upon to form

<sup>1</sup> The Sedition Act of 1795 (36 Geo. III., c. 8) forbade meetings for political purposes unless advertised beforehand. It was revived for a short period by 41 Geo. III., c. 30. (C. M. A.).

military bodies for the defence of the State, and when the government was declaring the most profound confidence in the spirit of the nation as a whole. The restraints have ceased, yet everything is just as it was before; it might even be supposed that the restrictive law was still in force. The reason is that a people assured of its rights enjoys them with moderation and tranquillity. If they are abused, it is because the people have begun to tremble for them: recklessness and precipitation are begotten of fear.<sup>1</sup>

<sup>1</sup> Until the establishment of troops on the European model at the end of the eighteenth century, the janissaries had for ages exercised a tyrannical despotism in Turkey (Maggill's *Travels in Turkey*, 1803-1806); and, even at a later date, in 1807, the janissaries and the mob raised a revolt and deposed Selim III. (C. M. A.)

## CHAPTER LXIV.

### MEASURES TO BE ADOPTED AGAINST THE ILL EFFECTS OF OFFENCES ALREADY COMMITTED — CONCLUSION OF THE WORK.

General  
Result of  
preceding  
Investiga-  
tions.

As the general result of principles already enunciated on the subject of penal legislation, we perceive that on the whole the outlook is hopeful, and affords a well-founded expectation of a diminution in the number of crimes and of some mitigation in the awards of punishment. At first our topic presents to the mind nothing but gloomy thoughts and sombre images of suffering and terror. But when we dwell upon evils of this character, feelings of pain soon give place to agreeable and consolatory reflections; for it is not long before we discover that the heart of man is not corrupted by any original or incurable perversity; that the multiplicity of offences is solely due to legislative errors which may readily be repaired; and that the very evil which springs from the offences is in many respects susceptible of reparation.

Problem  
of Penal  
Legislation.

Herein lies the great problem of penal legislation: (α) To reduce, so far as may be, all the evil of offences to evil of a kind that pecuniary compensation will suffice to cure; and (β) to throw the cost of this cure upon the authors of the evil, or, in case they make default, upon the public. What can be done in these respects is far more than would at the outset seem to be at all possible.

'Cure' by  
means of  
Compensa-  
tion.

I use this word 'cure' seeing that I present the injured party, whether an individual or the community, in the character of a sick person, suffering from the consequences

of crime. The simile is a just one, and points to the most suitable procedure, without introducing popular passions and antipathies, such as the idea of crime is but too apt to engender, even amongst legislators themselves.

There are three principal sources of crime: 'incontinence,' 'hatred,' and 'greed.'

Offences which spring from *incontinence* are rarely of a kind that can be cured by pecuniary compensation. Such a remedy may be applied in certain cases of seduction, or even of conjugal infidelity; but it affords no cure for the hurt that honour feels, nor for that part of the evil which consists in disturbance of the family peace.

Offences  
springing  
from In-  
continence.

It must be noted that, unlike other offences, whose ill effects are the more surely arrested the more generally the offences become known, crimes of incontinence often become hurtful only when made public. Many a worthy citizen, who would conceive it to be his plain duty to publish any act of fraud within his cognizance, would take good care not to reveal the secret of an illicit amour that chanced to be whispered in his ear. To keep a fraud concealed is to become a party to it. To expose to the light of day some hidden act of frailty is to produce an evil without any compensating advantage; for it results in wounding the sensibility of those whose shameful secret is betrayed, while repairing none of the mischief of their misdeed. I count among the institutions that do honour to the humanity of our age the asylums for lying-in and the hospitals for foundlings, which have so often averted the unhappy consequences of despair by shrouding with a veil of mystery the sad and enduring sequel to the folly of an hour. The harsh judgment that denounces such indulgence is based upon a false principle of asceticism.

The crimes that spring from *hatred* are also often of such a nature that compensation in money cannot be applied to them. And, indeed, even where compensation can be applied, it is rarely complete; it cannot undo what

Offences  
springing  
from  
Enmity.

is done; it cannot replace a lost limb, or restore a son to his father, a father to his children. But it may in some measure affect the condition of the injured party, by supplying him with a lot or portion of good to indemnify him for a lot or portion of evil; by crediting him, in the accounts that show how he fares, with an item to balance some item on the other side.

As to this class of crime, it is essential to observe that day by day, as civilization advances, such offences decrease in point of number. In most European States, it is really wonderful how few crimes take their rise in the angry passions, so natural to mankind, and so fierce in the earlier phases of society. What an object of emulation for such backward governments as have not yet reached this stage in police administration—for the rulers of lands in which the sword of justice has so far failed to triumph over the stiletto of revenge!

Offences  
springing  
from Greed.

The really inexhaustible source of crime is *greed*. Here, then, is the foe, always active and alert to seize every advantage, against whom war must be waged with unremitting zeal. And this war calls for peculiar tactics, the principles of which have been much misunderstood.

Be indulgent to this passion so long as it confines itself to the use of peaceful means; concern yourself mainly in depriving the delinquent of every particle of unlawful gain. But become more and more severe in proportion as it lends itself to overt action, or has recourse to threats and violence; and reserve expedients of the utmost severity in case it should abandon itself to some atrocity, such as arson or murder. It is, indeed, in the skilful management of these gradations that the art of punishment consists.

Do not forget that, so far as penal laws are concerned, police administration is but a choice of evils. If you would act wisely in such matters, always keep the balance in your hand; and, in your zeal to get rid of some trifling evil, do not be guilty of the folly of creating a more serious one.

Death as a remedy is almost always either unnecessary or inefficacious. It is unnecessary when applied to those whom a milder penalty would deter from crime, or who might be restrained by mere imprisonment; it is inefficacious when applied to those who throw themselves into its arms, so to speak, as a refuge in their despair. The policy of a lawgiver who punishes every crime with death recalls the timorous aversion of a child who crushes the insect he hardly dare look upon.<sup>1</sup> But if the state of society, the frequency of some grave offence, demand the use of this terrible expedient, make bold, without in any way aggravating the torments of death, to invest it with an aspect even more formidable than that bestowed on it by Nature; surround it with doleful accessories, with emblems of the crime, and all the tragic pomp of ceremonial rites. Be slow, however, to believe in this necessity for death. By shunning it as a punishment, you will, indeed, prevent its occurrence as a crime; for, when a man is about to commit one of two offences, it is highly important to make it greatly to his interest not to commit the graver of the two. In short, it is very desirable to turn the assassin into a simple thief—to give the fellow a good reason for choosing a reparable crime rather than one of which the consequences can never be repaired.

Capital  
Punish-  
ment.

An injury that can be repaired really amounts to little or nothing. Everything that can be adequately compensated by a pecuniary indemnity may soon become as though it were nothing, and never had been anything; for, if the injured party always receives equivalent compensation, the 'alarm' occasioned by the crime disappears altogether, or is reduced to the lowest point possible.

The Principle of Repara-  
tion.

The main object to be secured is that the compensation payable in respect of offences shall be drawn from the funds of the delinquents themselves, either by a levy on

Compensation, if possible, to be made by delinquent himself.

<sup>1</sup> See note *ante*, vol. ii., p. 158. 'What a lamentable case it is to see so many Christian men and women strangled on that cursed tree of the gallows!': (Coke, *Third Institute*). (C. M. A.)

Compensation from Compulsory Labour.

any property already acquired by them, or by a charge on the earnings of work to be compulsorily imposed upon them. If this were done, innocence and security would go hand in hand, while suffering and sorrow would be the portion of those only who disturbed the social order. Such is the pinnacle of perfection to which we should aspire, though we may only hope to attain it by slow degrees and continuously sustained effort. The satisfaction of reaching this goal will be the guerdon of a courageous and enlightened administration.

But, if this source of compensation prove inadequate, we must needs provide indemnity, either from the public treasury or by way of *private insurances*.

The Public should prosecute Crime at public charges.

The imperfections of our laws, from this point of view, are very marked. If a crime be committed, those who suffer from it, whether in person or in pocket, are abandoned to their fate.<sup>1</sup> And yet society, which they have helped to uphold, is under obligation to protect them, and, when that protection fails, owes them an indemnity.

When a private individual, at his own charges, prosecutes a criminal, even though the crime were directed against himself, he is no less a defender of the State than the man who fights its foreign foes; and the losses he sustains in defending the public ought to be repaired at the public expense.

Compensation to Persons wrongly convicted of Crime.

But when an innocent man has suffered through some judicial error—when he has been arrested, cast into gaol, branded as a criminal, and condemned to endure the anxiety of a trial and the anguish of long imprisonment—it is not only on his account, but for the sake of her own fair fame, that Justice should make full and speedy reparation. Established to redress all wrongs, does she alone seek an exclusive privilege to work iniquity?

Insurance against Loss by Crime.

Governments have not made provision for any of these indemnities, though in England certain voluntary associations have been formed to supply the deficiency. If the

<sup>1</sup> Cf. *ante*, vol. ii., p. 267. (C. M. A.)

institution of insurance is good in one case, it is good in all, with such precautions as are needed to prevent negligence and fraud.<sup>1</sup>

Every accumulation of funds, public or private, is subject to loss through fraudulent practices; and such frauds may, of course, operate to diminish the value of insurance, without, however, destroying its utility altogether. Do we not still cultivate our orchards, though the crop may, perchance, perish by a thousand accidents? *Monts de piété* have proved a success in many countries.<sup>2</sup> An institution of that class, founded in London about the middle of the eighteenth century, was a failure from the beginning, owing to the dishonesty of the directors; and their peculations created a lasting prejudice, which has prevented any other attempt of the same kind. By parity of reasoning, we might arrive at the conclusion that ships are useless in warfare, because the *Royal George*, whose port-holes had been left open, sunk whilst at anchor.<sup>3</sup>

<sup>1</sup> Insurance is good because the insurer is prepared to bear the loss, deeming the premiums he receives to be an equivalent for the risk which he runs. But the remedy is in itself imperfect, because it is always necessary to pay the premium, which is a certain loss, so as to safeguard oneself against a loss which is uncertain. In this point of view, it is desirable that all unforeseen losses, which may fall upon individuals through no fault of their own, should be covered at the public expense. The more numerous the contributories, the less appreciable the loss to any one of them. But, on the other hand, it must be noted that a public fund is more exposed to fraud and waste than a private one. Losses which fall directly on the individual impart the strongest possible impulse to motives of vigilance and economy (Dumont).

<sup>2</sup> These institutions for lending money to the poor upon pledges, and without charging interest, were first established in the fifteenth century, and called *montes pietatis*. The word 'mont' or 'mount' was originally applied to any pecuniary fund. Banks of this kind were founded at Perugia in 1464, at Rome in 1539, at Naples in 1540, and at Paris in 1777, under the style of *monts de piété*. They were in the first instance supported by voluntary contributions; but afterwards it became necessary to charge interest (Gilbart's *History of Banking*, edition of 1907, p. 197). (C. M. A.)

<sup>3</sup> The *Royal George*, of 108 guns, was overset at Spithead on August 29, 1782, with a loss of more than 800 souls. In Cowper's words,

'A land-breeze shook the shrouds,  
And she was overset;  
Down went the *Royal George*,  
With all her crew complete.' (C. M. A.)

General  
Result as to  
Reparation.

Assurance against crimes might have a twofold object: (a) To create a fund for the indemnification of injured parties in case the delinquent be unknown or insolvent; ( $\beta$ ) to defray, in the first instance, the costs of criminal prosecutions, a purpose which might, in the case of poor persons, be extended to the costs of causes purely civil. But the scheme of such indemnities would be foreign to the matter I have now in hand. I have elsewhere enunciated the principles, and I must here confine myself to a statement of the general result of the investigation. It is this: *That by good laws we may reduce almost all offences to acts which can be repaired by mere pecuniary compensation; and that, when this is the case, the evils springing from crime may be almost wholly done away with.*<sup>1</sup>

The result thus simply stated does not at first appeal to the imagination; but the more one dwells upon it, the more one recognizes its importance and its soundness. It is not the brilliant salons of the fashionable world that we seek to interest in a formula almost arithmetical in expression; it is to the careful consideration of statesmen that we present it, and to them it belongs to sift and investigate its truth and to test its utility.

Aim of this  
Branch of  
Political  
Science.

The science whose foundations we have explored can appeal only to lofty minds with whom the public welfare has become a passion. It has no concern with the shifty and subversive form of politics that prides itself on under-hand schemes, that sees glory in a welter of human misery, that finds the prosperity of one nation in the decay of another, and mistakes the upheavals of governments for the achievements of genius. We are here engaged with the most profound interests of humanity; with the art of fashioning the manners and character of a nation; with expedients for raising the security of individuals to its highest pitch, and for deriving results equally advantageous

from various and varying forms of government. Such is the aim of this branch of political science, open and generous, seeking only for light, asking for nothing exclusive, and finding no mode of perpetuating the benefits it confers more certain than that of sharing them with every member of the great family of nations.

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